JOHN J

MACLAREN, JOHN J.

BILLS, NOTES AND CHEQUES

THE BILLS OF EXCHANGE ACT, 1890

CANADA

AND THE ACTS AMENDING THE SAME,

WITH

NOTES AND ILLUSTRATIONS

FROM CANADIAN, ENGLISH AND AMERICAN DECISIONS, AND REFERENCES TO ANCIENT AND MODERN FRENCH LAW.

BY

THE HONORABLE

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PREFACE TO THE THIRD EDITION.

THE demand for this work since the second edition was exhausted has led the author to give it a careful revision. A number of questions discussed in the previous editions, and which were not then covered by authority, have since been settled. These results are embodied in the present edition, and in consequence considerable portions have been re-written. The amending Acts of 1897, 1901 and 1902 have been embodied in the text, and the necessary changes made. The number of new cases added exceeds three hundred, the majority of them being decisions on the Imperial and Canadian Acts.

The reasons for including the text of the Civil Code of Quebec on Bills and Notes in previous editions having largely disappeared, the new American Negotiable Instruments Law, which has been adopted by more than twenty States, has been inserted in its place.

J. J. M.

Toronto, July, 1904.

PREFACE TO THE FIRST EDITION.

IN the course of his work upon the Act of 1890 the writer found that in a number of instances where our Parliament had not followed the Imperial Act, the changes had not been carried into other sections where this was necessary in order to make the Act consistent with itself. The absence of any general rule for unprovided for cases, it was also thought, would interfere with the uniformity of the law in the different provinces, which was one of the main objects of the Act. The Minister of Justice signified his approval of these changes, and the amending Act of 1891 was introduced and passed.

The present work was delayed in order that these amendments might be embodied in their proper places. Meantime the notes and illustrations were extended beyond the limits originally contemplated. The references to cases, statutes and other authorities in the work number nearly four thousand. The number of separate decisions cited is two thousand three hundred, and the number of illustrations nearly a thousand. The decisions are brought down to January, 1892.

Where a summary of the law is given for any country it is taken as a rule from the latest edition of one of the leading text writers. Thus, for a summary of the law in England reference is usually made to Byles on Bills, 15th ed., 1891, or to Chalmers, 4th ed., 1891. For the United States, Daniel on Negotiable Instruments, 4th ed., 1891, and Randolph on Commercial Paper, have been selected. For the old French

law, Pothier, Contrat de Change, is usually cited; and for the modern French law, the Code de Commerce, and Nouguier, Lettres de Change, 4th ed., 1875.

The Canadian cases cited number nine hundred and fifty, the English about the same number, and the American nearly four hundred. It will be observed that the illustrations have been arranged in three classes in the foregoing order. The Canadian cases have been subdivided by provinces, observing the order in which the provinces are usually named. The date of each decision has been given, and the cases in each class arranged in chronological order, beginning with the oldest. The principal English and Canadian Statutes have also been given for convenience of reference and for comparison with the dates of the cases.

The Canadian cases comprise nearly all the decisions of the Supreme Court and of the provincial Courts on the subject except those based on repealed statutes, such as the Stamp Act, and the old laws regulating pleading and procedure, and those which depend upon the facts of the particular case. A large proportion of the Canadian cases will be found in the illustrations, where they are given with considerable fulness.

Special attention has also been paid to the decisions upon the Imperial Act of 1882. Not only those in the regular English Law Reports have been cited, but also the Scotch and Irish cases, and those in the other English Reports, including twenty-five cases from the London Times Law Reports. These decisions are of special value on account of the great similarity of the two Acts, especially in view of the provision in section 8 of the amending Act of 1891, that the rules of the common law of England including the law merchant shall apply to Canada, except in so far as they are inconsistent with the express provisions of the Canadian Act.

The decisions selected from the great mass of American cases have been chiefly from the reports of the Supreme Court of the United States, and of the higher Courts of those States which follow most closely the common law and the law merchant. They are, as a rule, upon points that are not affected by local statutes or usages. Preference has also been given to decisions of these Courts in the leading commercial centres with which Canada has most intercourse.

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In order to facilitate reference, in addition to the alphabetical index at the end of the volume, a full table of contents is given at the beginning.

The list of overruled cases is, of course, only a partial one, but it is hoped that it may be found useful. It will be observed that a number of cases are there referred to that are not to be found in the body of the work.

Toronto, April, 1892. J. J. M.

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ADDENDA ET CORRIGENDA.

Page 62, line 17, add: "A life insurance agent sent to the company a series of bogus applications, selecting the names of persons in the locality. He kept up the premiums, and from time to time reported the deaths of the insured, forging claim papers, proofs, etc. The company sent him cheques to the order of the respective beneficiaries. He forged receipts and releases, and also forged the indorsement of the payees, getting the cheques cashed at the local branch of the bank on which the cheques were drawn. Neither the insured nor the beneficiaries had any knowledge of the transactions. Held by the Court of Appeal that the case was governed by the Vagliano case, that the payees were fictitious persons, and that the bank paying the cheques was not liable to the company: London Life Insurance Co. v. Molsons Bank, 3 O. W. R. 858. (June 29th, 1904.)

Page 142, line 9, add: "This case is now reported in 7 O. L. R. 90. The judgment was affirmed by the Supreme Court, June 8th, 1904. (Ewing v. Dominion Bank, 24 C. L. T. 285.) Application was made to the Privy Council for leave to appeal, but was refused.

Page 201, line 11, add: "To enable C. to obtain a loan from plaintiff, defendant drew a bill payable to his own order. Plaintiff accepted the bill, and gave C. the money, not noticing that the bill was not indorsed. Held that plaintiff was entitled to defendant's indorsement and to recover the amount: Walters v. Neary, 20 T. L. R. 555. (May 19th, 1904.)

Page 389, line 42, for "165 N. S." read "165 U. S."

Page 395, line 23, for "U. S. Q. B." read "U. C. Q. B."

Page 405, line 9, add: "A clerk of plaintiffs by fraud induced them to sign cheques crossed generally in favor of certain persons. He then forged the indorsement of the payees, and deposited the cheques in defendant's bank where he had an account. The latter credited him the amount in its books, crossed the cheques specially, and had them cashed. It then entered the amount in his pass-book, and allowed him to draw against it. Held that the bank was protected under this section: Akrokerri Mines v. Economic Bank, 20 T. L. R. 564. (June 6th, 1904.)

CASES CITED.

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CASES OVERRULED, QUESTIONED OR DISTINGUISHED.

Where a case is in whole or in part in conflict with a provision of the Bills of Exchange Act, 1890, the section of the Act alone is given, even when the case may have been previously overruled or overriden by legislation prior to the Act.

Agricultural Assn. v. Federal Bank, 6 Ont. A. R. 192 (1881), overruled in part by Bank of England v. Vagliano [1891], A. C. 107.

Allen v. Kemble, 6 Moore P. C. 314 (1848), qualified in Rouquette v. Overmann, L. R. 10 Q. B. 540 (1875).

Armstrong v. Hemstreet, 22 O. R. 336 (1892), overruled by Davidson v. Fraser, 28 S. C. Can. 272 (1897).

Arthur v. Clarkson, 35 Beav. 458 (1865), disapproved in Re Whitaker, 42 Ch. D. at p. 125 (1889).

Bacon v. Searles, 1 H. Bl. 88 (1788), overruled by Jones v. Broadhurst, 9 C. B. at p. 185 (1850).

Balloch v. Binney, 5 N. B. (3 Kerr) 440 (1847). *Contra*, section 49, s-s. 5.

Banbury v. Lisset, 2 Stra. 1211 (1774), overruled by Griffin v. Weatherby, L. R. 3 Q. B. at p. 759 (1868).

Bank of Bengal v. Fagan, 5 Moore Ind. App. 40 (1849), distinguished in Jonmenjoy v. Watson, 9 App. Cas. 568 (1884).

Bank of Bengal v. Macleod, 7 Moore P. C. 35 (1849), distinguished in Jonmenjoy v. Watson, 9 App. Cas. at p. 567 (1884).

Bank of Michigan v. Gray, 1 U. C. Q. B. 422 (1841). *Contra*, section 49 (*f*).

Bank of Montreal v. Langlois, 3 Rev. de Leg. 88 (1847). *Contra*, section 32 (*a*).

Bank of U. C. v. Parsons, 3 U. C. Q. B. 383 (1846). *Contra*, section 45 (*d*) (1).

Banque du Peuple v. Ethier, 1 R. L. 47 (1869). *Contra*, section 8, s-s. 4.

Bartrum v. Caddy, 9 A. & E. 275 (1838), distinguished in Glasscock v. Balls, 24 Q. B. D. 13 (1889).

Baxter v. Bruneau, 17 R. L. 359 (1889). *Contra*, section 29, s-s. 3.

Bell v. Moffat, 20 N. B. (4 P. & B.) 121 (1880). *Contra*, sections 23 and 56.

Berton v. Central Bank, 10 N. B. (5 Allen) 493 (1863). *Contra*, section 17, s-s. 2.

Bettis v. Weller, 30 U. C. Q. B. 23 1870), overruled by Third Nat. Bank v. Cosby, 40 U. C. Q. B. 69 (1878).

Bickerdike v. Bollman, 1 T. R. 405 (1786), criticized in Carter v. Flower, 16 M. & W. at p. 748 (1847).

Boulton v. Welsh, 3 Bing. N. C. 688 (1837), overruled by Lewis v. Gompertz, 6 M. & W. at p. 403 (1840).

Boutin, In re, Q. B. 12 S. C. 186 (1897), overruled by Denenberg v. Mendelssohn, Q. R. 23 S. C. 128 (1903).

Brook v. Hook, L. R. 6 Ex. 89 (1871), said to be overruled in part by McKenzie v. British Linen Co., 6 App. Cas. 82 (1881), per Strong, C.J., in Scott v. Bank of N. B., 23 S. C. Can. at p. 283.

Brown v. Davies, 3 T. R. 80 (1789), overruled by Ex parte Swan, L. R. 6 Eq. 358 (1868).

Brown v. Nat. Bank of India, 18 T. L. R. 669 (1902), criticized in Capital & Counties Bank v. Gordon [1903] A. C. 240.

Brown v. Philpot, 2 M. & Rob. 285 (1840), overruled by Smith v. Braine, 16 Q. B. at p. 254 (1851).

Brunet v. Lalonde, 16 L. C. R. 347 (1866). *Contra*, Aurele v. Durocher, 5 R. L. 165 (1873).

Callaghan v. Aylett, 2 Camp. 549 (1810), overruled by Fenton v. Goundry, 13 East, 459 (1811).

Camidge v. Allenby, 6 B. & C. 373 (1827), distinguished in Leeds Bank v. Walker, 11 Q. B. D. at p. 88 (1883).

Canadian Investment Co. v. Brown, 19 R. L. 364 (1890). *Contra*, section 63, s-s. 2.

Castrique v. Buttigieg, 10 Moore P. C. 94 (1855), explained in Abrey v. Crux, L. R. 5 C. P. 42 (1869).

Catton v. Simpson, 8 A. & E. 136 (1838), overruled in Aldous v. Cornwell, L. R. 3 Q. B. at p. 578 (1868).

Cazet v. Kirk, 9 N. B. (4 Allen) 543 (1860). *Contra*, section 9 (*d*).

Coles v. Bank of England, 10 A. & E. 437 (1839), questioned in Baxendale v. Bennett, 3 Q. B. D. at p. 534 (1878).

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Crouch v. Credit Foncier, L. R. 8 Q. B. 374 (1873), discussed in London & County Bank v. River Plate Bank, 20 Q. B. D. p. 240 (1887); held to have been overruled by Goodwin v. Robarts, 1 App. Cas. 476 (1876), in Bechuanaland Co. v. London Trading Bank [1898], 2 Q. B. 658.

DeBerdt v. Atkinson, 2 H. Bl. 336 (1794), overruled by Maltass v. Siddle, 6 C. B. N. S. 494 (1859).

Dechantal v. Pominville, 6 L. C. J. 88 (1860), overruled. See Cleroux v. Pigeon, 32 L. C. J. 236 (1888).

Delaney v. Hall, 3 N. S. (2 Thom.) 401 (1858). *Contra*, section 49 (*e*).

Dingwall v. Dunster, 1 Dougl. 247 (1779). *Contra*, section 61.

Down v. Halling, 4 B. & C. 330 (1825), dissented from in Bank of Bengal v. Macleod, 5 Moore, Indian Appeals, 1 (1849); distinguished in London & County Bank v. Groome, 8 Q. B. D. 288 (1881).

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Fisken v. Meehan, 40 U. C. Q. B. 146 (1876), overruled by Macdonald v. Whitfield, 8 App. Cas. 733 (1883).
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Hall v. Smith, 1 B. & C. 407 (1823), overruled by Ex parte Buckley, 14 M. & W. 469 (1845).
Hansard v. Robinson, 7 B. & C. 90 (1827), not followed in Wright v Lord Maidstone, 1 K. & J. 701 (1855).
Harris v. Benson, 2 Str. 910 (1713), overruled by Lumley v. Palmer, 2 Str. 1000 (1734); Windle v. Andrews, 2 B. & A. 699, 700 (1819).
Harvey v. Cane, 34 L. T. N. S. 64 (1876), questioned in Hogarth v. Latham, 3 Q. B. D. 651 (1878).
Harvey v. Bank of Hamilton, 16 S. C. Can. 714 (1888). *Contra*, section 8, s-s. 4.
Heath v. Sansom, 2 B. & Ad. 291 (1831), questioned in Smith v. Braine, 16 Q. B. 244 (1851).
Hindbaugh v. Blakey, 3 C. P. D. 136 (1878), overruled by Steele v. McKinlay, 5 App. Cas. 785 (1880). See sec. 17 (2).
Howland v. Jennings, 11 U. C. C. P. 272 (1861), overruled by St. John v. Rykert, 10 S. C. Can. 278 (1884).

Ianson v. Paxton, 23 U. C. C. P. 439 (1874), overruled by Macdonald v. Whitfield, 8 App. Cas. 733 (1883).
Ingham v. Primrose, 7 C. B. N. S. 82 (1859), dissented from in Baxendale v. Bennett, 3 Q. B. D. 532 (1878).

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Jones v. Broadhurst, 9 C B. 173 (1850), qualified in Cook v. Lister, 13 C. B. N. S. 543 (1863); discussed in Thornton v. Maynard, L. R. 10 C. P. 698 (1875); questioned in Solomon v. Davis, 1 C. & E. 83 (1883).

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Keene v. Beard, 8 C. B. N S. 372 (1860), qualified in Hopkinson v. Forster, L. R. 19 Eq. 76 (1874).

Kirk v. Blurton, 9 M. & W. 284 (1841), questioned in Forbes v. Marshall, 11 Ex. at p. 180 (1855); distinguished in Odell v. Cormack, 19 Q. B. D. 223 (1887).

Kirkwood v Smith, [1896] 1 Q. B, 582, overruled by Kirkwood v. Carroll, [1903] 1 K. B. 531.

Lagueux v. Cassault, 2 Rev. de Leg. 28 (1813), overruled. See p. 37.

Lagueux v. Everett, 1 Rev. de Leg. 510 (1817). *Contra*, section 17, s-s. 2.

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Lewis v. Clay, 67 L. J. Q. B. 224 (1897), questioned in Herdman v. Wheeler, [1902] 1 K. B. at p. 371.

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Merchants' Bank v. Spinney, 13 N. S. (1 R. & G.) 87 (1879). *Contra*, section 51, s-s. 7.

Merchants' Bank v. Stirling, 13 N. S. (1 R. & G.) 439 (1880). *Contra*, section 63, s-s. 2.

Merritt v. Maxwell, 14 U. C. Q. B. 50 (1886). *Contra*, section 90, s-s. 2.

Montgomery v. Boucher, 14 U. C. C. P. 45 (1864), overruled by St. John v. Rykert, 10 S. C. Can. 278 (1884).

Musgrave v. Drake, 5 Q. B. 185 (1843), dissented from in Hogg v. Skeen, 18 C. B. N. S. 426 (1865).

Napier v. Schneider, 12 East, 420 (1810), held overruled in Re General South American Co., 7 Ch. D. 644 (1877).

Narbonne v. Tetreau, 9 L. C. J. 80 (1863). *Contra*, section 56.

Nash v. Gibbon, 9 N. B. (4 Allen), 479 (1860). *Contra*, section 9 (*d*).

O'Connor v. Clark, 18 Grant, 422 (1871), overruled by St. John v. Rykert, 10 S. C. Can. 278 (1884).
Owen v. Van Uster, 10 C. B. 318 (1850), distinguished in Re Barnard, 32 Ch. D. 452 (1886).

Palmer v. Fahnestock, 9 U. C. C. P. 172 (1859). *Contra*, sec. 9 (*d*).
Parry v. Nicholson, 13 M. & W. 778 (1845), doubted in Hirschmann v. Budd, L. R. 8 Ex. 172 (1873).
Pariseau v. Ouellet, M. C. R. 69 (1850). *Contra*, section 56.
Partridge v. Bank of England, 9 Q. B. 396 (1846), criticized in Goodwin v. Robarts, L. R. 10 Ex. 354 (1875).
Paterson v. Hardacre, 4 Taunt. 114 (1811), overruled by Bailey v. Bidwell, 13 M. & W. 73 (1844).
Paterson v. Pain, 1 L. C. R. 210 (1851). *Contra*, section 56.
Piers v. Hall, 18 N. B. (2 P. & B.) 34 (1878). *Contra*, sections 23 and 56.
Pike v. Street, Moo. & M. 226 (1828), dissented from in Smith v. Squires, 13 Man. 360 (1901).
Powell v. Ford, 2 Stark. 164 (1817), disapproved of in Lewis v. Sapio, M. & M. 39 (1827).
Pratt v. Macdougall, 12 L. C. J. 243 (1868). *Contra*, sections 56 and 72.

Rea v. Meggott, Cas. temp. Hardw. 77 (1730), overruled by Lumley v. Palmer, 2 Str. 1000 (1734); Windle v. Andrews, 2 B. & A. at pp. 699, 701 (1819).
Regina v. Hawkes, 2 Moody, C. C. 60 (1840), overruled by Peto v. Reynolds, 9 Ex. 415 (1854).
Richardson v. Daniels, 5 U. C. O. S. 671 (1838). *Contra*, section 39, s-s. 2.
Richards, Re, Shenstone v. Brock, 36 Ch. D. 541 (1887), criticized in Re Whitaker, 42 Ch. D. at p. 125 (1889).
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Robarts v. Tucker, 16 Q. B. 560 (1851), distinguished in Bank of England v. Vagliano, [1891] A. C. at p. 117.
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Rothschild v. Corney, 9 B. & C. 388 (1829), distinguished in London and County Bank v. Groome, 8 Q. B. D. 288 (1881).
Rothschild v. Currie, 1 Q. B. 43 (1841), questioned in Allen v. Kemble, 6 Moore P. C. 323 (1848); explained and qualified in Horne v. Rouquette, 3 Q. B. D. 521, 523 (1878).
Rowe v. Young, 2 B. & B. 165 (1820). *Contra*, 1 & 2 Geo. IV. c. 78 (Imp.) and section 19, s-s. 2 (*a*).

Savage v. Aldren, 2 Stark. 232 (1817). *Contra*, section 33.
Saxton v. Stevenson, 23 U. C. C. P. 503 (1874). *Contra*, section 9 (*d*).
Scholey v. Walsby, Peake N. P. C. 34 (1797), doubted in Phillips v. Warren, 14 M. & W. 380 (1845).
Seymour v. Wright, 3 L. C. R. 454 (1852), overruled by Mitchell v. Browne, 9 L. C. J. 168 (1865).

Shellard, Ex parte, L. R. 17 Eq. 109 (1873), disapproved of in Buck v. Robson, 3 Q. B. D. 680 (1878).

Shepherd v. Harrison, L. R. 5 H. L. 116 (1871), distinguished in Ex parte Banner, 2 Ch. D. 278 (1875).

Sibree v. Tripp, 15 M. & W. 23 (1846), distinguished in Foakes v. Beer, 9 App. Cas. at p. 613 (1884).

Singer v. Elliott, 4 T. L. R. 524 (1888), disapproved of in Robinson v. Mann, 31 S. C. Can. 484 (1901).

Solarte v. Palmer, 1 Bing. N. C. 194 (1834), criticized in Everard v. Watson, 1 E. & B. 804 (1853); qualified in Paul v. Joel, 3 H. & N. at p. 459 (1858).

Steele v. McKinlay, 5 App. Cas. 754 (1880), distinguished in Wilkinson v. Unwin, 7 Q. B. D. 636 (1881); in Holmes v. Durkee, 1 C. & E. 25 (1883); and in Macdonald v. Whitfield, 8 App. Cas. 733 (1883).

Stoessiger v. South Eastern Railway, 3 E. & B. 549 (1854), distinguished in Reg. v. Bowerman, [1891] 1 Q. B. 112, 115.

Strange v. Price, 10 A. & E. 125 (1839), overruled by Paul v. Joel, 3 H. & N. 459 (1858).

Strathy v. Nicholls, 1 U. C. Q. B. 32 (1844), overruled by Muir v. Cameron, 10 ibid. 356 (1852).

Strong v. Foster, 17 C. B. 201 (1855), dissented from in Ewin v. Lancaster, 6 B. & S. at p. 576 (1865).

Swinyard v. Bowes, 5 M. & S. 62 (1816), distinguished in Camidge v. Allenby, 6 B. & C. 383 (1827).

Tindal v. Brown, 1 T. R. 167 (1786), overruled in Chapman v. Keane, 3 A. & E. 197 (1835).

Tinson v. Francis, 1 Camp. 19 (1807), dissented from in Ex parte Swan, L. R. 6 Eq. 358 (1868).

Trimbey v. Vignier, 1 Bing. N. C. 151 (1834), not followed in Bradlaugh v. De Rin, L. R. 5 C. P. 473 (1870).

Trimingham v. Maud, L. R. 7 Eq. 201 (1868), disapproved in Ex parte Gomez, L. R. 10 Ch. at p. 647 (1875).

Walker v. Barnes, 5 Taunt. 240 (1813), dissented from in Siggers v. Lewis, 1 Cr. M. & R. 370 (1834).

Walwyn v. St. Quintin, 1 B. & P. 652 (1797), overruled in Cory v. Scott, 3 B. & Ald. 622 (1820).

Warrington v. Furbor, 8 East. 242 (1807), distinguished in Camidge v. Allenby, 6 B. & C. 373 (1827).

West v. Bown, 3 U. C. Q. B. 290 (1846). *Contra*, section 8, s-s. 4.

Whatley v. Tricker, 1 Camp. 35 (1807). *Contra*, section 61.

Wood v. Young, 14 U. C. C. P. 250 (1864). *Contra*, section 9 (*d*).

Woolsey v. Crawford, 2 Camp. 445 (1810), held overruled in Re General South American Co., 7 Ch. D. 644 (1877).

Young v. Grote, 4 Bing. 253 (1827), questioned in Baxendale v. Bennett, 3 Q. B. D. at p. 534 (1878); overruled by Scholfield v. Londesborough [1896] A. C. 514, and Imperial Bank v. Bank of Hamilton [1903] A. C. 49.

ABBREVIATIONS

The Nova Scotia and New Brunswick Reports are numbered from the beginning of each series, as—N. S. and—N. B., respectively; the names of the reporters being added for the earlier volumes.

The United States Supreme Court Reports are cited by the names of the reporters followed by (U. S.), up to volume 90; after that by the number. For State reports the customary contractions are used; when cited by the names of the reporters, the name of the State, as a rule, is added.

A. & E. .... Adolphus and Ellis' Reports, King's Bench.
Am. Rep. .... American Reports, State Courts.
App. Cas. .... Appeal Cases, Law Reports, 1875-90.
Atk. .... Atkyns' Reports, Chancery.

B. C. R. .... British Columbia Reports.
B. N. A. Act .... British North America Act, 1867.
B. & Ald. .... Barnewall and Alderson's Reports, King's Bench.
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INTRODUCTION.

The origin of Bills and Notes was formerly a vexed question among legal antiquarians. On the one hand it was claimed that they were known to the ancient Romans and Jews, while on the other hand they were assigned to a very recent date. It is now conceded, however, that the letter or order on Athens in favor of his son of which Cicero speaks in one of his letters had little in common with a modern Bill of Exchange and that the writing or note of hand for ten talents mentioned in the Book of Tobit was not the parent of the modern Promissory Note, but a mere acknowledgment of debt.

Promissory Notes are no doubt the older instruments; but they only acquired their negotiable character long after that of Bills of Exchange had been firmly established as a [illegible] he law merchant. The process of evolution by which [illegible] the other instruments which are now recognized as negotiable acquired that right under the law merchant has probably been nowhere better described than in the judgment of the late Chief Justice Cockburn in the case of Goodwin v. Robarts reported in the Law Reports, 10 Exchequer (1875).

This was a case in which the negotiability of certain Russian and Austrian bonds was in issue. The Chief Justice took occasion to correct the idea that the law merchant was a fixed or stereotyped body of law, forming part of the ancient common law or coeval with it. He claimed that it was of comparatively recent origin and was simply the usages and customs of merchants in the different departments of trade, ratified by the decisions of courts of law. upon proof of their existence in the marts of commerce. He there quotes with approval the remark of Lord Campbell,

that "when a general usage has been judicially ascertained and established, it becomes part of the law merchant, which Courts of Justice are bound to know and recognize."

He then proceeds to trace the history of the development of the law merchant as regards the different classes of negotiable instruments as follows:—

"Bills of Exchange are known to be of comparatively modern origin, having been first brought into use, so far as is at present known, by the Florentines in the twelfth, and by the Venetians about the thirteenth century. The use of them gradually found its way into France, and, still later and but slowly, into England. We find it stated in a law tract, by Mr. Macleod, entitled 'Specimen of a Digest of the Law of Bills of Exchange,' printed, we believe, as a report to the government, but which, from its research and ability, deserves to be produced in a form calculated to insure a wider circulation, that Richard Malynes, a London merchant, who published a work called the 'Lex Mercatoria' in 1622, and who gives a full account of these bills as used by the merchants of Amsterdam, Hamburg, and other places, expressly states that such bills were not used in England. There is reason to think, however, that this is a mistake. Mr. Macleod shows that promissory notes, payable to bearer, or to a man and his assigns, were known in the time of Edward IV. Indeed, as early as the statute of 3 Rich. II. c. 3, bills of exchange are referred to as a means of conveying money out of the realm, though not as a process in use among English merchants. But the fact that a London merchant writing expressly on the law merchant was unaware of the use of bills of exchange in this country, shows that that use at the time he wrote must have been limited. According to Professor Story, who herein is, no doubt, perfectly right, 'the introduction and use of bills of exchange in England,' as indeed it was everywhere else, 'seems to have been founded on the mere practice of merchants, and gradually to have acquired the force of a custom.' With the development of English commerce the use of these most convenient instru-

ments of commercial traffic would of course increase, yet, according to Mr. Chitty, the earliest case on the subject to be found in the English books is that of Martin v. Boure, Cro. Jac. 6 (1603), in the first James 1. Up to this time the practice of making these bills negotiable by indorsement had been unknown, and the earlier bills are found to be made payable to a man and his assigns, though in some instances to bearer. But about this period, that is to say, at the close of the sixteenth or the commencement of the seventeenth century, the practice of making bills payable to order, and transferring them by indorsement, took its rise. Hartmann, in a very learned work on Bills of Exchange, recently published in Germany, states that the first known mention of the indorsement of these instruments occurs in the Neapolitan Pragmatica of 1607. Savary, cited by Mons. Nouguier, in his work 'Des Lettres de Change,' had assigned to it a later date, namely, 1620. From its obvious convenience this practice speedily came into general use, and as part of the general custom of merchants, received the sanction of our Courts. At first the use of bills of exchange seems to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not: see Chitty on Bills, 8th ed., p. 13.

"In the meantime, promissory notes had also come into use, differing herein from bills of exchange that they were not drawn upon a third party, but contained a simple promise to pay by the maker, resting, therefore, upon the security of the maker alone. They were at first payable to bearer, but when the practice of making bills of exchange payable to order, and making them transferable by indorsement, had once become established, the practice of making promissory notes payable to order, and of transferring them by indorsement, as had been done with bills of exchange, speedily prevailed. And for some time the courts of law acted upon usage with reference to promissory notes, as well as with reference to bills of exchange.

"In 1680, in the case of Shelden v. Hentley, 2 Shower, 160, an action was brought on a note under seal by which the defendant promised to pay to bearer £100, and it was objected that the note was void because not made payable to a specific person. But it was said by the Court 'Traditio facit chartam loqui, and by the delivery he (the maker) expounds the person before meant; as when a merchant promises to pay to the bearer of the note, anyone that brings the note shall be paid.' Jones, J., said that 'it was the custom of merchants that made that good.' In Bromwich v. Lloyd, 2 Lutwyche, 1582 (1697), the plaintiff declared upon the custom of merchants in London on a note for money payable on demand, and recovered; and Treby, C.J., said that 'bills of exchange were originally between foreigners and merchants trading with the English; afterwards, when such bills came to be more frequent, then they were allowed between merchants trading in England, and afterwards between any traders whatsoever, and now between any persons, whether trading or not; and, therefore, the plaintiff need not allege any custom, for now those bills were of that general use that upon an indebitatus assumpsit they may be given in evidence upon the trial.' To which Powell, J., added, 'On indebitatus assumpsit for money received to the use of the plaintiff the bill may be left to the jury to determine whether it was given for value received.'

"In Williams v. Williams, Carthew, 269 (1699), where the plaintiff brought his action as indorsee against the payee and indorser of a promissory note, declaring on the custom of merchants, it was objected on error, that the note having been made in London, the custom, if any, should have been laid as the custom of London. It was answered, 'that this custom of merchants was part of the common law, and the Court would take notice of it ex officio; and, therefore, it was needless to set forth the custom specially in the declaration, but it was sufficient to say that such a person secundum usum et consuetudinem mercatorum, drew the bill.' And the plaintiff had judgment.

"Thus far the practice of merchants, traders, and others, of treating promissory notes, whether payable to order or bearer, on the same footing as bills of exchange, had received the sanction of the Courts, but Holt having become Chief Justice, a somewhat unseemly conflict arose between him and the merchants as to the negotiability of promissory notes, whether payable to order or to bearer, the Chief Justice taking what must now be admitted to have been a narrow-minded view of the matter, setting his face strongly against the negotiability of these instruments, contrary, as we are told by authority, to the opinion of Westminster Hall, and in a series of successive cases, persisting in holding them not to be negotiable by indorsement or delivery. The inconvenience to trade arising therefrom led to the passing of the statute of 3 & 4 Anne, c. 9, whereby promissory notes were made capable of being assigned by indorsement, or made payable to bearer, and such assignment was thus rendered valid beyond dispute or difficulty.

"It is obvious from the preamble of the statute, which merely recites that it had been held that such notes were not within the custom of merchants, that these decisions were not acceptable to the profession or the country. Nor can there be much doubt that by the usage prevalent amongst merchants, these notes had been treated as securities negotiable by the customary method of assignment as much as Bills of Exchange properly so called. The Statute of Anne may, indeed, practically speaking, be looked upon as a declaratory statute, confirming the decisions prior to the time of Lord Holt.

"We now arrive at an epoch when a new form of security for money, namely, goldsmiths' or bankers' notes, came into general use. Holding them to be part of the currency of the country, as cash, Lord Mansfield and the Court of King's Bench had no difficulty in holding, in Miller v. Race, 1 Burr. 452 (1758), that the property in such a note passes, like that in cash, by delivery, and that a party taking

it bona fide, and for value, is subsequently entitled to hold it against a former owner from whom it has been stolen.

"In like manner it was held, in Collins v. Martin, 1 B. & P. 648 (1797), that where bills indorsed in blank had been deposited with a banker, to be received when due, and the latter had pledged them with another banker as security for a loan, the owner could not bring trover to recover them from the holder.

"Both these decisions, of course, proceeded on the ground that the property in the bank-note payable to bearer passed by delivery; that in the bill of exchange by indorsement in blank, provided the acquisition had been made bona fide.

"A similar question arose in Wookey v. Pole, 4 B. & Ald. 1 (1820), in respect of an exchequer bill, notoriously a security of modern growth. These securities being made in favour of blank or order, contained this clause: 'If the blank is not filled up, the bill will be paid to bearer.' Such an exchequer bill, having been placed, without the blank being filled up, in the hands of the plaintiff's agent, had been deposited by him with the defendants, on a bona fide advance of money. It was held by three judges of the Queen's Bench, Bayley, J., dissentiente, that an exchequer bill was a negotiable security, and judgment was therefore given for the defendants. The judgment of Holroyd, J., goes fully into the subject, pointing out the distinction between money and instruments which are the representatives of money, and other forms of property. 'The Courts,' he says, 'have considered these instruments, either promises or orders for the payment of money, or instruments entitling the holder to a sum of money as being appendages to money, and following the nature of their principal.' After referring to the authorities he proceeds: 'These authorities shew that not only money itself may pass, and the right to it may arise by currency alone, but further, that these mercantile instruments, which entitle the bearer of them to money, may also pass, and the right to them may arise, in like manner, by currency or delivery. These decisions proceed upon the

nature of the property (i.e., money), to which such instruments give the right, and which is in itself current, and the effect of the instruments, which either give to their holders, merely as such, a right to receive the money, or specify them as the persons entitled to receive it.'

"Another very remarkable instance of the efficacy of usage is to be found in much more recent times. It is notorious that, with the exception of the Bank of England, the system of banking has recently undergone an entire change. Instead of the banker issuing his own notes in return for the money of the customer deposited with him, he gives credit in account to the depositor, and leaves it to the latter to draw upon him, to bearer or order, by what is now called a cheque. Upon this state of things the general course of dealing between bankers and their customers has attached incidents previously unknown, and these by the decisions of the courts have become fixed law. Thus, while an ordinary drawee, although in possession of funds of the drawer, is not bound to accept unless by his own agreement or consent, the banker, if he has funds, is bound to pay on presentation of a cheque on demand. Even admission of funds is not sufficient to bind an ordinary drawee, while it is sufficient with a banker; and money deposited with a banker is not only money lent, but the banker is bound to repay it when called for by the draft of the customer: see Pott v. Clegg, 16 M. & W. 321, 1847. Besides this, a custom has grown up among bankers themselves, of marking cheques as good for the purposes of clearance, by which they become bound to one another.

"Though not immediately to the present purpose bills of lading may also be referred to as an instance of how general mercantile usage may give effect to a writing, which without it would not have that effect at common law. It is from mercantile usage as proved in evidence, and ratified by judicial decision in the great case of Lickbarrow v. Mason, 2 T. R. 63 (1787), that the efficacy of bills of lading to pass the property in goods is derived.

"It thus appears that all these instruments which are said to have derived their negotiability from the law merchant had their origin, and that at no very remote period, in mercantile usage, and were adopted by the law into our Courts as being in conformity with the usages of trade; of which, if it were needed, a further confirmation might be found in the fact that, according to the old form of declaring on bills of exchange, the declaration always was founded on the custom of merchants.

"Usage, adopted by the Courts, having been thus the origin of the whole of the so-called law merchant as to negotiable securities, what is there to prevent our acting upon the principle acted upon by our predecessors, and followed in the precedents they have left to us? Why is it to be said that a new usage which has sprung up under altered circumstances, is to be less admissible than the usages of past times? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory enactment? It is true that this scrip purports, on the face of it, to be a security not for money, but for the delivery of a bond; nevertheless we think that substantially and in effect it is a security for money, which, till the bond shall be delivered, stands in the place of that document, which, when delivered, will be beyond doubt the representative of the sum it is intended to secure. Suppose the possible case that the borrowing government, after receiving one or two instalments, were to determine to proceed no further with its loan, and to pay back to the lenders the amount they had already advanced; the scrip with its receipts would be the security to the holders for the amount. The usage of the money market has solved the question whether scrip should be considered security for, and the representative of, money by treating it as such.

"The universality of a usage voluntarily adopted between buyers and sellers is conclusive proof of its being in accordance with public convenience; and there can be no

doubt that by holding this species of security to be incapable of being transferred by delivery, and as requiring some more cumbrous method of assignment, we should materially hamper the transactions of the money market with respect to it, and cause great public inconvenience. No doubt there is an evil arising from the facility of transfer by delivery, namely, that it occasionally gives rise to the theft or misappropriation of the security, to the loss of the true owner. But this is an evil common to the whole body of negotiable securities. It is one which may be in a great degree prevented by prudence and care. It is one which is counterbalanced by the general convenience arising from facility of transfer, or the usage would never have become general to make scrip available to bearer, and to treat it as transferable by delivery. It is obvious that no injustice is done to one who has been fraudulently dispossessed of scrip through his own misplaced confidence, in holding that the property in it has passed to a bona fide holder for value, seeing that he himself must have known that it purported on the face of it to be available to bearer, and must be presumed to have been aware of the usage prevalent with respect to it in the market in which he purchased it.

"Lastly, it is to be observed that the tendency of the Courts, except only in the time of Lord Holt, has been to give effect to mercantile usage in respect to securities for money, and that where legal difficulties have arisen, the legislature has been prompt to give the necessary remedy, as in the case of promissory notes and of the East India Bonds.

"The authorities relied on on the part of the plaintiff do not appear to us materially to conflict with this view. In Glyn v. Baker, 13 East, 509 (1817), which was an action to recover India bonds, and in which it was held that such bonds did not pass by delivery, the bonds were not made payable to bearer, and there was a total absence of proof that they passed by delivery, though it was asserted by counsel in argument that when these bonds, which in the first instance were made payable to the treasurer of the company, had been

indorsed by him, they were afterwards negotiable and passed by delivery from one to another. The inconvenience which would have arisen from this decision was remedied by the immediate passing of 51 Geo. III. c. 64, by which bonds of the East India Company were made transferable by delivery.

"The case of Partridge v. Governor and Company of the Bank of England, 9 Q. B. 396; 15 L. J. Q. B. 395 (1846), and which, amongst other things, turned on the negotiability of dividend warrants of the Bank of England, is not, so far as that question is concerned, altogether satisfactory, as the decision turned also upon other points. The bank was in the habit of paying dividends to those entitled to them by warrants, and it was pleaded and proved that by a usage of sixty years' standing of the bankers and merchants of London, these warrants which are not made to bearer were nevertheless negotiable so soon as the party to whom they were made payable had annexed to them the receipt which the bank required before payment would be made. Such a warrant had been obtained by an agent of the plaintiff authorized to receive his dividend, and had been made over to the defendants for good consideration, in fraud of the plaintiff, so far as the agent was concerned, but without knowledge of such fraud on the part of the defendants. The warrant had been delivered by the defendants to the bank, with whom they had an account, to be carried to their credit, and the amount had been entered to their credit in the cash book of the defendants, but had not been carried to their drawing account. The Court of Queen's Bench held this proof of the custom to be a good defence. The Court of Exchequer Chamber reversed their judgment, on the ground among others, that the custom relied on was 'rather a practice of trade than a custom properly so called, and that such a practice could not alter the law according to which such an instrument conferred no right of action on an assignee.' We quite feel the force of this distinction, though it is not quite so clear in what sense it was here intended to be applied. Possibly what was meant was, that the custom applied to the

warrants of a particular company, and therefore could not form the subject of any general mercantile usage.

"In Dixon v. Bovill, 3 Macq. 1 (1856), where the note was 'to deliver so much iron when required to the party lodging this document with me,' there was neither a promise to bearer, nor was there any proof whatever of any usage whereby such notes were dealt with as negotiable. The case has therefore, with reference to its facts, no bearing on the present.

"In Crouch v. The Credit Foncier of England, L. R. 8 Q. B. 374 (1873), the defendants, a limited company, had issued bonds payable to bearer, 'subject to the conditions indorsed on this debenture'; and by the conditions so indorsed the bonds were to be paid off by a certain number being drawn at stated periods; in which respect, it may be observed, they bore a close resemblance to the bonds of foreign governments when loans are thus raised by way of bond. A bond thus made having been stolen from the lawful owner, and having been purchased bona fide by the plaintiff from the thief, was drawn for payment. The plaintiff claimed payment, which was refused, whereupon the action was brought. It was there held by three Judges of the Court of Queen's Bench that the plaintiff could not recover; first, because, even assuming that a promise to pay under seal could be considered a promissory note, here the conditions annexed to the promise took away that character from the instrument. No evidence had been offered at the trial as to whether these or similar documents were in practice treated as negotiable, nor was any express admission made as to the point; but it was assumed from the report of the learned Judge before whom the cause was tried, that this had been tacitly admitted. But it was said that these instruments having been only of recent introduction, it followed that such custom, to whatever extent it had gone, must also have been quite recent. Under these circumstances the Court held that, while it was incompetent to the defendants, as an individual company, to give to that which was not a negotiable

instruments at law the character of negotiability by making it payable to bearer, the custom could not have that effect, because, being recent, it formed no part of the ancient law merchant. For the reasons we have already given we cannot concur in thinking the latter ground conclusive. While we quite agree that the greater or less time during which a custom has existed may be material in determining how far it has generally prevailed, we cannot think that, if a usage is once shewn to be universal, it is the less entitled to prevail because it may not have formed part of the law merchant as previously recognized and adopted by the Courts. It is obvious that such reasoning would have been fatal to the negotiability of foreign bonds, which are of comparatively modern origin, and yet, according to Gorgier v. Mieville, 3 B. & C. 45 (1824), are to be treated as negotiable. We think the judgment in Crouch v. The Credit Foncier, L. R. 8 Q. B. 374 (1873), may well be supported on the ground that in that case there was substantially no proof whatever of general usage. We cannot concur in thinking that if proof of general usage had been established, it would have been a sufficient ground for refusing to give effect to it that it did not form part of what is called 'the ancient law merchant.'

"In addition to the cases we have already referred to, in which usage has been relied on as making mercantile instruments negotiable, the case of Lang v. Smyth, 7 Bing. 284 (1831), was cited as showing that the question with reference to instruments of this description turns upon how far the particular instrument has by usage acquired the quality of negotiability. The action had reference to Neapolitan bonds with coupons attached to them, which latter referred to a certificate. The plaintiff's agent being in possession of the coupons belonging to the plaintiff, but not of the certificate, fraudulently pledged the coupons with the defendant, who took them bona fide. On an action by the plaintiff to recover the amount received by the defendant on the coupons, Tydal, C.J., left it to the jury to say whether the coupons without the certificate 'passed from hand to

hand like money or bank notes,' in other words, 'whether they had acquired from the course of dealing pursued in the city, the character of bank notes, bills of exchange, dividend warrants, exchequer bills or other instruments, which formed part of the currency of this country.' The jury, indeed, found in the negative, but it was held by the Court of Common Pleas that the question had been rightly left to them. If the usage had been found the other way, and the Court had been satisfied with the verdict, it would no doubt have been upheld.

"We must by no means be understood as saying that mercantile usage, however extensive, should be allowed to prevail, if contrary to positive law, including in the latter such usages as, having been made the subject of legal decision, and having been sanctioned and adopted by the Courts, have become by such adoption part of the common law. To give effect to a usage which involves a defiance or disregard of the law would be obviously contrary to a fundamental principle. And we quite agree that this would apply quite as strongly to an attempt to set up a new usage against one which has become settled and adopted by the common law as to one in conflict with the more ancient rules of the common law itself. Thus, it having been decided in the two cases of More v. Manning, 1 Comyns, 311 (1719), and Acheson v. Fountain, 1 Str. 557 (1736), that when a bill of exchange was indorsed to A. B. without the words or order, the bill was nevertheless assignable by A. B., by further indorsement, Lord Mansfield and the Court of King's Bench, in the case of Edie v. The East India Company, 2 Burr. 1216 (1761), held that evidence of a contrary usage was inadmissible. In like manner, in Grant v. Vaughan, 3 Burr. 1516 (1764), where a cash note, payable to bearer, had been lost by the owner, but had been taken by the plaintiff bona fide for value, on an action on the note by the latter against the maker, Lord Mansfield having left it to the jury to say 'whether such drafts as this, when actually paid away in the course of trade dealing and business, were negotiable or in

fact and practice negotiable'; and the jury, influenced no doubt by the natural desire to protect the owner of the note, having found for the defendant, Lord Mansfield and the Court here again set their verdict aside, on the ground that the law having been settled by former decisions that notes payable to bearer passed by delivery to a bona fide holder, the Judge ought to have directed a verdict for the plaintiff.

"If we could see our way to the conclusion that, in holding the scrip in question, to pass by delivery, and to be available to bearer, we were giving effect to a usage incompatible either with the common law or with the law merchant as incorporated into and embodied in it, our decision would be a very different one from that which we are about to pronounce. But so far from this being the case we are, on the contrary, in our opinion, only acting on an established principle of that law in giving legal effect to a usage, now become universal, to treat this form of security, being on the face of it expressly made transferable to bearer, as the representative of money, and as such, being made to bearer as assignable by delivery."

The reader is also referred to the chapter on "Other Negotiable Instruments," to be found at page 449 of the present work, as to the progress made in Canada by legislation and otherwise towards placing instruments other than bills, notes and cheques upon a similar footing.

THE

BILLS OF EXCHANGE ACT, 1890,

CANADA

53 VICTORIA, CHAPTER 33, AS AMENDED BY 54-55 VICTORIA, CHAPTER 17; 56 VICTORIA, CHAPTER 30; 57-58 VICTORIA, CHAPTER 55; 60-61 VICTORIA, CHAPTER 10; 1 EDWARD VII., CHAPTER 12; AND 2 EDWARD VII., CHAPTER 2.

An Act relating to Bills of Exchange, Cheques, and Promissory Notes.

BY the British North America Act, section 92, sub-section 18, the right to legislate respecting Bills of Exchange and Promissory Notes was assigned exclusively to the Dominion Parliament. So sparingly, however, had this power been exercised during the first nineteen years of Confederation, that when the Statutes were revised and consolidated in 1886, the whole of the Dominion legislation on the subject was comprised in ten short sections of chapter 123. The remaining twenty sections are made up of provincial enactments passed before Confederation, which were as a rule applicable only to a single province. Apart from the contents of that chapter, the only Canadian legislation on the subject in force in any part of the Dominion was: (1) two short chapters of the Civil Code of Quebec, (2) a Dominion legislation

single section in the Revised Statutes of Nova Scotia, (3) two sections in the Statutes of New Brunswick, all of which, except two Articles of the Code relating to evidence, are repealed by the present Act; and (4) such provisions in the criminal statutes and those relating to procedure in the provincial courts as refer to actions on bills and notes, which latter are not affected by the Act.

A cheque being a bill of exchange drawn on a bank, payable on demand, as defined by section 72 of the Act, falls under the authority of the Dominion Parliament, especially as the subject of banking is also within its exclusive jurisdiction. Previous legislation respecting cheques was still more meagre, being almost wholly confined to the short chapter on the subject in the Civil Code and the references to these instruments in the Criminal Statutes.

A code.

The present Act is really a codification of the law, although this idea is not expressed in its title, as is the case in the English Act from which it is copied, the title adopted being the same as that of chapter 123 of the Revised Statutes of Canada, with the addition of the single word "cheques."

Provincial subjects.

Although the Act treats directly only of Bills, Notes and Cheques, which are clearly within the jurisdiction of the Dominion Parliament, it also touches and affects other matters which are within the exclusive jurisdiction of the local legislatures. Mention need only be made of such subjects as the capacity of persons, and of corporations, the law of contracts, of agency, of partnership, of suretyship, of evidence, and the procedure in the provincial civil courts. There are also other matters indirectly affected, which come chiefly under the head of "Property and Civil Rights" and "the Administration of Justice." The fact above mentioned, that there has hitherto been scarcely any Dominion legislation upon the subject, has doubtless been the reason why more conflict has not arisen between the Dominion and the Provinces. It is too much to expect that some of the provisions of the new Act bearing upon the foregoing points, or others unmentioned, which may not agree with provincial law upon

these subjects, will not be questioned in the Courts in the near future.

The Bill which subsequently became law in the form of the present Act, was first introduced by the Minister of Justice in the House of Commons in the session of 1889, in the following terms: "The object of this Bill is to render uniform in almost every particular the laws throughout the Dominion with respect to these contracts. The law under this Bill will be uniform in every particular, except as regards statutory holidays, in respect of which special provision is to be made as regards the Province of Quebec. I may say that the Bill is principally the codification of the existing law relating to Bills, Cheques and Promissory Notes, and that the changes which are made in our law on these subjects are in the direction of making it uniform with the English Statute law."—Commons Debates, 1889, p. 14. As first submitted, it was almost an exact transcript of the Imperial Bills of Exchange Act, 1882, 45 and 46 Vict. cap. 61, the full title of which is "An Act to codify the law relating to Bills of Exchange, Cheques and Promissory notes." The changes proposed at that time were restricted almost entirely to substituting "Canada" for "the United Kingdom" wherever the latter words occurred in the Act, and the insertion of the numerous holidays of the different provinces for the comparatively few holidays recognized in England. **Bill of 1889**

The Bill was partially considered by the House of Commons in 1889, and various suggestions and recommendations were made during the session and the following recess by private individuals and commercial bodies. As a result, the Bill was re-introduced in 1890 with a number of modifications. Still further changes were made in both Houses of Parliament, most of these being in the direction of retaining special provisions of the law formerly recognized in Canada or in some of the provinces, and substituting these in the Bill for certain clauses of the Imperial Act which were embodied in the first draft. In the following notes special attention will be called to those sections which differ from **Bill of 1890**

the former Canadian law, as well as to those in which the Imperial Act has not been followed.

Imperial Act.

The Bills of Exchange Act, 1882, is of special interest as being the first instance of the codification, by the Imperial Parliament, of any portion of the Civil Law. The experiment has been an unqualified success, and no greater tribute could be paid to those who prepared the bill and successfully piloted it through both Houses, than the mere mention of the fact that although it has now been in force for more than twenty-one years, not a single amendment has been found to be necessary. The amount of litigation which has arisen over it has been comparatively small, and it has been very favorably received by the English Judges, some of whom were not disposed to look with much approval upon the idea of a code.

The changes which were made in the Canadian Bill in its passage through Parliament tended, not only to lessen its similarity to the Imperial Act as above stated, but some of them also interfered with the uniformity of the law throughout the Dominion, which was stated to be its chief object. Examples of the former are found in the legislation regarding bills payable at sight, and as to the payment by banks of demand drafts on them, when the endorsement is forged; and of the latter, in the special provisions regarding the protest of inland bills in Quebec, and the retention of the provincial tariffs for notarial services. These and other changes of a like nature will be more specially noticed, when considering the particular sections affected.

No uniform rule.

But probably the change which would have interfered most seriously with the uniformity of the law, and which would have brought about great diversity in the jurisprudence of the respective provinces, was the omission from the Act of a clause that stood in the original bill as section 97, and which was struck out in the Senate.—Senate Debates, 1890, p. 467. It was a reproduction of section 97, sub-section 2, of the Imperial Act, and read as follows: "The rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange

promissory notes and cheques." All the Dominion Statutes in force at the passing of the Act, as well as all the subsisting provincial statutes on the subject passed prior to Confederation, with the unimportant exceptions above mentioned, having been repealed by section 95, recourse would have been had in unprovided for cases in the several provinces, to the law as there originally introduced, in so far as it might be applicable, and where this failed, to the law in the respective provinces, which by analogy might serve as a rule in each particular case. The Act is no doubt a comparatively complete code of the law upon the subject, but a number of cases unprovided for will be pointed out in the course of the following notes, and experience will not fail to disclose many more.

The absence of any uniform rule or standard for the decision of these cases would no doubt have led to considerable diversity in the jurisprudence. In all the provinces except Quebec the English law was that which was originally introduced. It was introduced, however, at different dates, so that English Statutes which were thus in force in some provinces were not in others. The French commercial law in force in Quebec, it is true, had much more in common with that of England than had other branches of the civil law. Both were based on the law merchant, and upon the usages and customs of merchants, who were much more cosmopolitan in their ideas than the legislators or Judges who framed or settled the laws of these countries. The course of provincial legislation also tended to similarity. The provisions of the successive English statutes on the subject were frequently re-enacted by the provinces, including Lower Canada. Notwithstanding these circumstances a glance at the jurisprudence, as it is recorded in the provincial reports, and as it will be briefly noted in the following pages, will show that there has been a wider divergence in the decisions of the Courts in the different provinces than might have been expected from the similarity of the statute law.

The desire to render the law throughout the Dominion as nearly uniform as possible, which was one of the leading objects of the Act, no doubt influenced the Parliament to

restore the clause which had been dropped from the Bill in 1890, and it was made retroactive in its effect, so that even a temporary divergence in jurisprudence from this cause will be avoided. In all cases not specially provided for by the Act, recourse will now be had in all the provinces to the common law of England and the law merchant, instead of to the law of France in Quebec or to that of England at varying dates in the other provinces, as would have been the case under the Act of 1890: (54-55 V. c. 17, s. 8).

Cases under old law

In the course of the following notes upon the various sections of the Act, cases decided under the old laws will be cited which in whole or in part may be no longer law, either in consequence of this Act or prior Dominion or provincial legislation. These have been noted, partly because they will be of assistance in tracing the course of jurisprudence on the subject, and partly because, for a few years at least, the cases which will come before our Courts will be largely upon bills and notes made before the passing of the Act, and consequently governed by the old laws.

In order to facilitate a comparison of this jurisprudence with the course of legislation, the dates of the various decisions will be given. A concise summary of the more salient points in the history of the law in the different provinces is also here given, which, it is hoped, will be found to be sufficiently full and exact for the purpose above stated.

French law.

Quebec.—The French commercial law, introduced with the Coutume de Paris on the establishment of the Conseil Superieur in 1663, as modified by subsequent enactments and decisions, and which was the law merchant, and substantially the same as the commercial law of England of the same period, regulated the bills and notes of the colony, until the conquest in 1760. The French Commercial Ordinance of March, 1673, has been generally held not to have been in force in the province on account of its not having been registered at Quebec: Merritt v. Lynch, 3 L. C. J. 276; 9 L. C. R. 353 (1859). The admirable treatise of Pothier on the subject, Contrat de Change, cannot consequently be accepted as an

authority without question where the ordinance may have made a change in the older law. See the Seventh Report of the Commissioners on the Civil Code of Lower Canada, page 216.

As to whether the law in force in Quebec between 1763 and 1774 was English or French, has been a matter of controversy. By the Proclamation of Geo. III. of the 7th of October, 1763, the Government of Quebec was constituted, embracing the present Province of Quebec and the eastern part of Ontario; the people to have the "enjoyment of the benefit of the laws of England," and the Courts to decide "all cases according to law and equity, and, as near as may be, agr eable to the laws of England." The validity of this Proclamation as a legislative act has been questioned, but it was affirmed by a unanimous judgment of the Court of King's Bench, delivered by Lord Mansfield: Campbell v. Hall, Cowper 204 (1774). It has also been recognized by the Privy Council: Lyons v. East India Co., 1 Moore 272 (1836); and by the House of Lords: Whicker v. Hume 7 H. L. Cas. 150 (1858). See Anderson v. Todd, 2 U. C. Q. B. at p. 84 (1845); Stuart v. Bowman, 2 L. C. R. 369 (1851); in appeal, 3 L. C. R. 309 (1853); 2 L. C. J. Appendix No. 2; Wilcox v. Wilcox, 2 L. C. J. 1 (1857); Atty.-Gen. v. Stewart, 2 Merivale 143 (1817); Jephson v. Riera, 3 Knapp 152 (1835); Cameron v. Kyte, ibid. 346 (1835); Beaumont v. Barrett, 1 Moore P. C. 272 (1836). The majority of the Judges in these Lower Canada cases held that the English law was not introduced into the province during the period in question. As a matter of fact, the Courts during that period administered the English law in commercial cases: Wilcox v. Wilcox, at p. 11.

By the Quebec Act of 1774, 14 Geo. III. c. 83 (Imp.), the limits of the province were extended westward, the proclamation of 1763 was revoked, and it was ordered, that in all matters of controversy relative to property and civil rights, resort should be had to the laws of Canada. This restored the French commercial law, with such modifications as had been introduced into Canada.

Provincial legislation

In 1777 an Ordinance was passed by the Governor and council of the province regulating the protesting of bills, and the damages, interest and fees thereon: 17 Geo. III. c. 3. Another Ordinance passed in 1785, 25 Geo. III. c. 2, provided by Art. 10 that, "in proof of all facts concerning commercial matters, recourse shall be had, in all the Courts of civil jurisdiction in the province, to the rules of evidence laid down by the laws of England." In 1793 a statute was passed to facilitate the negotiation of promissory notes: 34 Geo. III. c. 2.

In the Act of 1849, 12 Vict. c. 22, for the first time a general law on the subject was enacted, embodying provisions that up to that time had existed in custom alone. This statute, passed by the Parliament of United Canada, does not purport to be for Lower Canada alone, but it has been decided that it did not apply to Upper Canada: Ridout v. Manning, 7 U. C. Q. B., 35 (1849). It was embodied in the Consolidated Statutes for Lower Canada as chapter 64, and most of its provisions subsequently appeared in the Civil Code. The Act itself was largely taken from the English law and usages, and by section 30, in all cases not provided for, recourse was to be had to the laws of England as they stood at the date of its passage, viz., May 30th, 1849, a provision that was retained in the Civil Code as Art. 2340. This has been held to apply only to the form, negotiability and proof of bills and notes, and not to matters of civil obligation resulting from the contract: Guy v. Paré, Q. R. 1 S. C. 443 (1892). The short Act of the following year, 13-14 Vict. c. 23, applied to both Upper and Lower Canada, and became chapter 57 of the Consolidated Statutes of Canada. It related chiefly to the protesting of bills and notes.

Civil Code

The Civil Code, which came into force on the 1st of August, 1866, contained 76 articles (2279 to 2354) on the subject of bills, notes and cheques. In framing these articles the codifiers drew largely from English sources, and this, with articles 2340 and 2341 adopting the English law and the English rules of evidence, has tended to assimilate the law of Quebec on this subject to that of England, and thereby to

that of the other provinces. The Code, modified in a few particulars by Dominion legislation, continued to be the law of Quebec until it was repealed by section 95 of the present Act, with the exception of the two articles that relate to evidence, viz., 2341 and 2342: See Second Schedule.

Ontario.—What is now the Province of Ontario formed a part of Quebec until 1791. It was subject to the same laws, viz., the French law as modified by Canadian ordinances up to 1760, then military rule to the peace of 1763, English law after the proclamation of October, 1763, and French and Canadian law again after the 1st of May, 1775. The first Parliament of the new province of Upper Canada, which met at Niagara on the 17th of September, 1792, by its first Act, 32 Geo. III. c. 1, repealed that part of the Quebec Act relating to the laws of Canada, and provided that in all matters of controversy relative to property and civil rights, resort should be had to the laws of England as the rule for the decision of the same, that is, as they stood at that date.

English law.

In 1811 the Quebec Ordinance of 1777 regulating protests above referred to, was repealed by 51 Geo. III. c. 9. The principal Acts relating to bills and notes were the following: 2 Geo. IV. c. 12, declaring that the Imperial Acts 15 & 17 Geo. III., respecting small notes, should not apply to Upper Canada; 5 Wm. IV. c. 1, facilitating actions on bills and notes; 7 Wm. IV. c. 5, requiring acceptances to be in writing, and making an acceptance at a particular place general, unless the words "only and not otherwise or elsewhere" were added; 12 Vict. c. 76, regulating protests and damages; 14-15 Vict. c. 94, as to days of grace and holidays; and 19 Vict. c. 43, as to actions on lost bills and notes. These, with some others, were embodied in the Consolidated Statutes of Upper Canada of 1859, c. 42; and those sections which had not been previously altered by Dominion legislation formed sections 15 to 25 of chapter 123 of the Revised Statutes of Canada, 1886, but they continued to be applicable to Ontario alone.

Provincial legislation

English law.

Nova Scotia.—This province is considered to have become a British colony by discovery and settlement; and the date of its settlement is generally given as immediately following its discovery by Cabot in 1497: 1 Burge's Colonial Law, p. xxxiv.; Forsyth's Constitutional Law, p. 26. The first actual settlement was under the grant to Sir William Alexander in 1621. It subsequently passed into the hands of the French, who abandoned their claim by the Treaty of Utrecht in 1713. Even after this there was a conflict of possession, but it was finally confirmed to England by the Treaty of Paris in 1763. A country re-conquered from an enemy reverts to the same state that it was in before the conquest: Gumbe's case, 3 Knapp, 369 (1834). Having become a colony by settlement, the laws originally in force in Nova Scotia would be the common law of England, with the statutes passed before its settlement, in so far as they were applicable to the condition of the people: Uniacke v. Dickson, 2 N. S. (James) at p. 300 (1848). The time usually fixed upon in such cases, as the date when ordinary imperial legislation ceases to apply, is when the new colony first has a law-making body of its own. With respect to Nova Scotia, this date has not been authoritatively determined, some placing it as early as 1622, when Sir William Alexander made the first settlement, others placing it at various later dates.

From 1713 to 1758, the Government consisted of a Governor and a council, which undertook as a legislative body to pass ordinances. In 1755 the Chief Justice of the province held that they had no such power without an assembly, and this opinion was confirmed by the law officers of the Crown in England. The first General Assembly met at Halifax on the 3rd of October, 1758, and this would seem to be the latest date at which general British Statutes not specially applicable to it or the other colonies would apply: Doran v. Chambers, 20 N. S. at p. 311 (1887); Forsyth, p. 19.

Cape Breton is also claimed to have been a British colony from 1497 for the same reasons: 1 Burge, xxxiv. By

the Treaty of Utrecht, however, it was retained by France. Conquered in 1758, it was confirmed to England by the Treaty of Paris; and, by the proclamation of October 7th, 1763, it was annexed to Nova Scotia, and the laws of England made applicable. It was separated in 1784, and re-united to Nova Scotia in 1820: Re Cape Breton, 5 Moore P. C. 259 (1846). By the provincial Act 1 & 2 Geo. IV. c. 5, the laws of Nova Scotia were extended to Cape Breton.

Like most of the other colonies, the first Act passed by the Nova Scotia Assembly regarding bills of exchange was to regulate protests and the damages on dishonored bills, and this was done at the first session of 1758. The provincial legislation on the subject was very meagre, and at Confederation the whole of the statute law, apart from that relating to procedure in the Courts, was comprised in three short sections of chapter 82, Revised Statutes, as amended in 1865, relating respectively to (1) damages on protested bills, (2) the transfer and indorsement of promissory notes, and (3) requiring the acceptance of a bill to be in writing upon it. Notes for sums payable otherwise than in money were presumed to be for value, and recognized as promissory notes, but were not negotiable. These last have not been dealt with in the present Act, or in any other Dominion legislation, as they are not considered promissory notes within the meaning of the British North America Act.

Provincial legislation

The provincial Act making promissory notes assignable and indorsable like inland bills of exchange, and allowing the payee, indorsee, or holder to sue in his own name, was passed in 1768: 8 Geo. III. c. 2. This was substantially a re-enactment of the English Act 3 & 4 Anne, c. 9. From this it would appear that the Local Assembly was of opinion that the Imperial Act was not in force in the colony.

It is possible that in Nova Scotia the period of the restoration of Charles II. was adopted at the date at which English Statutes generally should cease to apply, as is said by Judge Chipman in The King v. McLaughlin, quoted below, to have been the case in New Brunswick. The statute

requiring the acceptance of a bill of exchange to be in writing on the bill was passed in 1865.

English law.

New Brunswick.—This province was a part of Nova Scotia until 1785; but all Nova Scotia statutes passed previous to that date were repealed in 1790, in so far as they affected the new province. As to English law and statutes, the rule would be the same as that applicable to Nova Scotia. The question was discussed in The King v. McLaughlin, an unreported case decided in 1830, quoted in Cassels' "Procedure in the Supreme and Exchequer Courts," at page 30, from which the following extracts are taken. Saunders, C.J., said that "the colony was not to be considered as either a conquered or a ceded country, and therefore the colonists at the time it was settled brought with them such parts of the common law of England as were applicable to their condition." Bliss, J., was of the same opinion, and Botsford, J., said he "never considered Nova Scotia, of which New Brunswick was a part, in the light of a conquered country. The British right to it was founded on discovery, and was always so maintained; and the grant to Sir William Alexander, in 1620, was founded on this right of discovery; therefore the English common law and all statutes in amendment of the common law passed anterior to the settlement of the colony were in force." Chipman, J., considered the true principle to be as laid down by Lord Mansfield in Lindo v. Lord Rodney, that each colony at its settlement "took with it the common law and all the statute law applicable to its colonial condition. It might not be a clear point as to what period of time should be deemed the time of the settlement of that colony; the period of the restoration of Charles II., it was understood, was adopted in practice by the General Assembly of the province at its first session as the period anterior to which all Acts of Parliament should be considered as extending, and the reason which had been given for this was that it was about the time of the restoration that the plantations began to be specially mentioned in Acts of Parliament, and the inference therefrom was that if any Act after that period

was intended to extend to the plantations it would be so expressed."

The provincial legislation on the subject of bills and notes was almost identical with that of Nova Scotia. Here also the statute of Anne was re-enacted at the first session held on the 3rd of January, 1786: 26 Geo. III. c. 23. The Act requiring the acceptance of a bill of exchange to be in writing on the bill was passed in 1836: 6 Wm. IV. c. 49. The law in force at the time of Confederation was to be found in 1 Rev. Stat. Title xxx. c. 116, as amended by 22 Viet. c. 22, and 30 Vict. c. 34. See Con. Stat. N. B. pp. 1064-5. Provincial legislation

Prince Edward Island.—This province is also claimed to have been a colony by settlement, dating from 1497, when it was discovered by Cabot: 1 Burge, xxxiv.; Forsyth, p. 26. It was, however, colonized by the French, but ceded to England by the treaty of Paris, and subsequently annexed to Nova Scotia by the proclamation of October 7th, 1763, when the laws of England at that date were made applicable to it. After being connected with Nova Scotia for some years it was made a separate colony in 1769, and its first Assembly convened in 1773. English law.

One of the first Acts of the Legislature was to fix the damages on protested bills: 13 Geo. III. c. 5. In 1836 an Act was passed to regulate the transfer of notes payable in Treasury notes: 6 Wm. IV. c. 3. In 1861 certain bills and notes were exempted from the usury laws: 24 Vict. c. 28. The Act of 1864, 27 Vict. c. 6, declared the acceptance of a bill at a particular place to be general unless accepted there "only and not otherwise and elsewhere." It also required all acceptances to be in writing on the bill, and provided a remedy on lost bills and notes. These were the principal provincial Acts in force on the 1st of July, 1873, when Prince Edward Island became a part of the Dominion of Canada. Provincial legislation

Manitoba.—There has been a conflict of decisions as to the law regulating bills and notes in this province. It formed a part of the territory of the Hudson's Bay Company under its charter of May 2nd, 1670. As the company was given the English law.

power "to make laws, constitutions, and ordinances," which were to be binding within its territories, subsequent English statutes would not be in force there unless specially made applicable to these territories or to the other colonies similarly situated: Connolly v. Woolrich, 11 L. C. J. 197 (1867). It does not appear that any laws or ordinances were made affecting bills or notes either by the company or by the Council of Assiniboia, which for some time before the union with Canada had jurisdiction over the central part of what is now the Province of Manitoba. With the rest of the Hudson's Bay territory it was purchased by Canada in 1869 and became a part of the Dominion on the 15th of July, 1870, under the Imperial order in council of June 23rd, 1870.

On the 8th of October, 1883, in the case of the Canadian Bank of Commerce v. Adamson, 1 Man. 3, it was held by Justice Dubuc that the English Bills of Exchange Act, 19 & 20 Vict. c. 97, was in force in that part of the province formerly Assiniboia by virtue of the Ordinance of 1864, which he held introduced the English law of that date. A few days later, October 16th, Mr. Justice Taylor laid down the rule that the laws of England as of May 2nd, 1670, the date of the Hudson's Bay Company's charter, were in force until April 11th, 1862, when the laws of England as at Her Majesty's accession (June 20th, 1837) were brought in by local ordinance of the Council of Assiniboia; and that by another ordinance of January 8th, 1864, the laws of England as of that date were introduced: Keating v. Moises, 2 Man. 47. Mr. Justice Killam subsequently held that these ordinances merely introduced the English procedure in the local Courts, and that the general statute law of England subsequent to the date of the Hudson's Bay Company's charter was not in force: Sinclair v. Mulligan, 3 Man. 481 (1886). This view was subsequently upheld by the full court, Chief Justice Taylor adopting the view of Mr. Justice Killam: Sinclair v. Mulligan, 5 Man. 17 (1888).

In the case of the Merchants' Bank v. Mulvey, 6 Man. 467 (1890), Mr. Justice Dubuc held that although the English Statute, 3 & 4 Anne, c. 9, which made promissory notes

transferable by indorsement, and gave the holder the right to sue in his own name, was not in force in Manitoba under the rule laid down in Sinclair v. Mulligan, yet the bank as holder of a note to order indorsed to it could recover on two grounds: (1) the Manitoba Statute 38 Vict. c. 12, which introduced the English law, brought in the statute of Anne, in so far as it related to procedure; and (2) the Dominion Banking Act of 1871 gave plaintiff the right to carry on the business of discounting notes. Under the authority of Goodwin v. Robarts, L. R. 10 Ex. 337 (1875), however, promissory notes would always have been negotiable in Manitoba, and private holders as well as banks could sue. Chief Justice Cockburn there held that the statute of Anne was declaratory of what was the law before it was changed by Lord Holt. The series of Lord Holt's decisions which the statute was passed to override extended from Clerke v. Martin, 2 Ld. Raym. 757 (1702) to Buller v. Crips, 6 Mod. 30 (1703), the first of them being more than 30 years subsequent to the Hudson Bay Company's charter.

The case of the Merchants' Bank v. Mulvey having been begun before the 22nd of May, 1888, was not affected by the Dominion statute 51 Vict. c. 33, which brought into force in Manitoba the laws of England relating to matters within the jurisdiction of the Parliament of Canada, as they existed on the 15th of July, 1870, and gave them a retroactive effect to that date, subject to any changes subsequently made by the Imperial or Canadian Parliament. This would include the law of England as of July 15th, 1870, respecting bills, notes and cheques.

The North-West Territories, having formed a part of the Hudson's Bay territory, were, like Manitoba, governed by the laws of England in force on the 2nd of May, 1670, until they became a part of Canada on the 15th of July, 1870. The Dominion statutes did not formerly apply to them unless specially so declared: North-West Territories Act, 1875, section 77. Now Dominion Acts apply to them unless inapplicable or otherwise declared: 49 Vict. c. 25, s. 2; R. S.

C. c. 1, s. 7. On the 2nd of June, 1886, the laws of England as they existed on the 15th of July, 1870, were introduced into the Territories: 49 Vict. c. 25, s. 3; R. S. C. c. 50, s. 11; Reg. v. Nan-e-quis-a-ka, 1 S. C. R. N. W. T. 24 (1889).

British Columbia.—The laws of England as they existed on November the 19th, 1858, were introduced into this province: R. S. B. C. c. 115; Reynolds v. Vaughan, 1 B. C. R. 3 (1872). There was no provincial legislation regarding bills and notes prior to the admission of the province into the Dominion, which took place July 20th, 1871, under the Imperial Order in Council of May 16th, 1871.

No uniform rule.

The Old Laws.—The Act of 1890 having repealed all previous Dominion and Provincial legislation, and not having furnished any uniform rule for cases not provided for, recourse would have been had for these to the old law as introduced into each province, and failing any provision applicable there, to the principles of the law on analogous subjects in the respective provinces.

If this rule were adopted, recourse would have been had in the Province of Quebec to the old French law, and in the other provinces to the law of England as it existed at the following respective dates: In Ontario as on the 15th of October, 1792; in Nova Scotia and New Brunswick, probably as on the 3rd of October, 1758; in Prince Edward Island, as on the 7th of October, 1763; in Manitoba as on the 15th of July, 1870; in the North-West Territories, for matters arising prior to the 2nd of June, 1886, to the law of England, as on the 2nd of May, 1670, and for matters arising since the 2nd of June, 1886, to the law of England, as on the 15th of July, 1870; and in British Columbia to the law of England, as on the 19th of November, 1858.

Act of 1891

It was no doubt the conclusion that such a conflict would to some extent defeat the uniformity which was declared to be one of the chief objects of the Act, that induced Parliament to pass section 8 of the amending Act of 1891, and to make it retroactive.

It might be thought that the Act is such a complete codification of the law regarding bills and notes, that few questions would arise which are not there provided for. It is however quite certain that many questions affecting these instruments directly or indirectly will arise for which no provision is made in the Act. It is not necessary here to do more than barely mention a few of these, such as "aval"; the relation of indorsers inter se; the rights and liabilities of parties to bills and notes, once the relation of principal and agent or that of principal and surety is established between them; whether the insolvency of the acceptor of a bill or the maker of a note makes these instruments mature or gives the holder any rights; whether a "joint" liability in Quebec is what is known as joint liability in the civil law or in the law of England.

The Act does not treat of the limitation of actions or prescription as affecting bills and notes, but leaves the law of each province to be applied within its bounds. The period is five years in Quebec and six years in the other provinces. This diversity will in many cases involve a question of the conflict of laws as between the different provinces. For its consideration the reader is referred to the notes under section 71, as the rules which govern it have much in common with the principles there laid down when there may be a conflict between the law of Canada and that in force in foreign countries. Limitation of actions.

The Act applies only to bills, notes, and cheques and not to other negotiable commercial instruments with the exception of section 94, which declares that the provisions as to crossed cheques shall apply to warrants for the payment of dividends. It is certain however that the rules laid down as to bills, notes, and cheques, will by analogy be applied in the course of business by bankers and merchants to the other commercial instruments which have so much in common with them, and some of which are now undergoing the process by which customs and usages of trade are crystallized into, and Other negotiable instruments.

acquire the force of law. A short chapter on other negotiable instruments will be found at the end of the notes on the Act.

It is difficult to over-estimate the importance to the commercial interests of the Dominion of not only a uniform law, but also a uniform interpretation and application of the law. This desirable end has been, no doubt, brought about in a large degree by the fact that we have had the advantage of the decisions of the English Courts under the Act since its adoption in 1882. On some of the points raised, and on which the judgments of our Courts have been conflicting, we will soon have authoritative decisions from the Supreme Court or the Privy Council.

The United States.—On account of the law as to bills and notes in many States differing in some respects from that of England and Canada, and also from that in force in other States, the reports have been of comparatively little value and in many cases actually misleading. In 1897 the State of New York adopted the Negotiable Instruments Law which will be found in the Appendix. Since that time it has also been adopted by twenty-one other States, and one territory, and by the District of Columbia. An examination of this law shews that in the main it agrees with the English and Canadian Acts. Attention will be called to some important differences under the respective sections. On the whole, it will, no doubt, not only tend to greater uniformity in the States affected, but to closer agreement with English and Canadian decisions.

PART I.

PRELIMINARY.

1. This Act may be cited as "The Bills of Exchange Act, 1890." Short title.

The Act was assented to on the 16th of May, but did not come into force until the 1st of September, 1890; section 97. It is not retrospective, and that part of it which is new law will not apply to instruments issued before its commencement, except in the case of transactions and matters connected with them after that time; as for instance, the acceptance of such a bill after the first of September, or the protesting of a bill or note issued before, but only dishonored after that date: Maxwell on the Interpretation of Statutes, 257, 271; Leeds and County Bank v. Walker, 11 Q. B. D. at p. 91 (1883).

The Imperial Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, from which the Canadian Act is almost wholly copied, has been held to be largely declaratory of the prior English law. The Master of the Rolls speaks of it as "the codifying Act which declares what was and is the law": Vagliano v. Bank of England, 23 Q. B. D. at p. 248 (1889); and Stirling, J., says that it "may be accepted as declaratory of the prior law": Re Bethell, 34 Ch. D. at p. 567 (1887). See also to the same effect the remarks of Lord Blackburn in McLean v. Clydesdale Banking Co., 9 App. Cas. at p. 106 (1883).

As the law in the various provinces of Canada has heretofore varied considerably, as shewn in the foregoing pages, and as the present Act has in a number of instances changed the law to make it harmonize with that of England, it cannot be so generally accepted as declaratory of the old law in Canada. Nevertheless, there will probably be a disposition

§ 1. on the part of the Courts to consider it as declaratory, where it is not clear that the law has been actually changed.

Interpretation.

2. In this Act, unless the context otherwise requires,—

"Acceptance."

(a) The expression "Acceptance" means an acceptance completed by delivery or notification;

This and the following clauses are copied from section 2 of the Imperial Act with the changes noted below. The words defined occur a number of times, and are used in a technical, and not in their ordinary or popular sense, hence the necessity for definitions or an interpretation clause.

"Acceptance" in connection with a bill was formerly used to indicate the act by which the drawee made himself responsible for the payment of a bill—whether by writing on the bill itself, or by collateral writing, or by parol: Lumley v. Palmer, 2 Str. 1000 (1735); Clarke v. Cock, 4 East, 57 (1803); Lagueux v. Everett, 1 Rev. de Leg. 510 (1817); Jones v. Goudie, 2 Rev. de Leg. 334 (1820). Since the two latter methods have been done away with by legislation, the word has been generally used to designate simply the writing on the bill. In the Act, however, when used without qualification, it is applied only to the cases where the writing and the liability thereunder have become complete and irrevocable by being followed either by delivery of the bill or by notification that it has been accepted: Cox v. Troy, 5 B. & Ald. 474 (1822). "Acceptance" in commercial language is also sometimes used to designate a bill that has been accepted, but it is not used in this sense in the Act. "Delivery" here is also used in the technical sense defined in clause (f) of the present section. "Notification" is not defined in the Act, but is described in section 21, and may be either written or verbal.

The definition and requisites of a valid acceptance are given in section 17.

(b) The expression "Action" includes counter-claim and set-off; § 2.

"Action."

The word "action" is not often used in the Act. It is found in sections 24, 30, 52, 69, 86 and 93. The procedure in the provincial Courts, in which actions on bills and notes are brought, is within the exclusive jurisdiction of the local Legislatures: B. N. A. Act, s. 92, s.-s. 14. The Dominion Parliament has however the right to interfere with this procedure in so far as may be necessary to deal fully with the subject of bills and notes. See Cushing v. Dupuy, 5 App. Cas. at p. 415 (1880). Most of the provinces have special provisions in their statutes and rules regulating the procedure of their Courts, as to actions on bills and notes. These have not been repealed by the present Act, and extracts from them will be found in the appendix.

Mr. Pitt Lewis in his work on County Court Practice, quoted with approval by Cockburn, C.J., in Stooke v. Taylor, 5 Q. B. D. 577 (1880), says: "A set-off would seem to be of a different nature from a defence (? counter-claim) inasmuch as a set-off appears to shew a debt balancing the debt claimed by the plaintiff, and thus leaving nothing due to him; while a counter-claim, it would seem, consists of a cross claim, not necessarily extinguishing or destroying the plaintiff's demand. In other words, a set-off appears to consist of a defence to the original claim of the plaintiff, a counter-claim is the assertion of a separate and independent demand, which does not answer or destroy the original claim of the plaintiff. The right to rely on a set-off has long existed. The right to set up a counter-claim was first given by the Judicature Acts." See also Gathercole v. Smith, 7 Q. B. D. 626 (1881); Pellas v. Neptune Marine Ass. Co., 5 C. P. D. 34 (1879). Set-off.

Under the Imperial and Ontario Judicature Acts there have been conflicting decisions as to whether a counter-claim was to be considered as a defence or as an action: see Vavasseur v. Krupp, 15 Ch. D. 474 (1880); Beddall v. Maitland, 17 Ch. D. 174 (1881): Irwin v. Brown, 12 Ont. P. R. 639 (1888). Counter-claim.

§ 2.

In Ontario provision is made in Consolidated Rules 251 and 252 under the Judicature Act, which read as follows: "251. A defendant may set up by way of counter-claim against the claim of the plaintiff, any right or claim whether the same sounds in damages or not. 252. A counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and the counter-claim."

Set-off corresponds approximately to compensation under the civil law. The Quebec Civil Code, Art. 1188, says: "Compensation takes place by the sole operation of law between debts which are equally liquidated and demandable and have each for object a sum of money or a certain quantity of indeterminate things of the same kind and quality. So soon as the debts exist simultaneously they are naturally extinguished in so far as their respective amounts correspond."

Incidental demand.

Counter-claim is analogous to a cross demand by a defendant in Quebec. The Code of Civil Procedure, Art. 217, says: "The defendant may set up by cross demand any claim arising out of the same causes as the principal demand, and which he cannot plead by defence. When the principal demand is for the payment of a sum of money, the defendant may also make a cross demand for any claim for money arising out of other causes; but such cross demand is distinct from and cannot retard the principal action. The court, whenever it renders judgment upon both demands at the same time, may declare that there is compensation."

"Bank."

(c) The expression "Bank" means an incorporated bank or savings bank carrying on business in Canada;

The corresponding word in the Imperial Act is "Banker," which includes a body of persons whether incorporated or not who carry on the business of banking. There the business is carried on largely by individuals or incorporated bodies. The bill as introduced into the Canadian

Parliament used the term "Banker" and also adopted the English definition. As the business is carried on in Canada chiefly by incorporated banks operating under the provisions of the Bank Act, 53 Vict. c. 31, and savings banks operating under 53 Vict. c. 32, both of which came into force on the 1st of July, 1891, it was determined to restrict to these corporations the provisions relating to banking. The provisions relating to cheques upon these banks will be found in Part III. of this Act, sections 72 to 81 inclusive. As our Parliament refused to adopt the principle laid down in section 60 of the Imperial Act, which protects a banker who has paid a demand bill or a cheque on a forged indorsement, the omission of private banks from the definition and their exclusion from the provisions and privileges of the Act is not of so much consequence. § 2.

Formerly private bankers might use the words "bank," "banking company," "banking house," "banking association," or "banking institution," provided the words "not incorporated" were added. Now, however, any private person or body using any of these terms is guilty of a misdemeanor and liable to a fine not exceeding $1,000, or to imprisonment for a term not exceeding 5 years, or to both: 53 Vict. c. 31, ss. 100, 101.

(*d*) The expression "Bearer" means the person in possession of a bill or note which is payable to bearer; "Bearer

A bill is payable to bearer which is expressed to be so payable or on which the only or last indorsement is an indorsement in blank: section 8, s-s. 3. Where a person acquires a bill for value from the holder to whose order it is payable without its being endorsed, he does not thereby become the "bearer" or entitled to the rights of a transferee of a chose in action, and the right to have the indorsement of the transferrer: section 31, s-s. 4. On obtaining such indorsement he would become the "bearer" of the bill. The bearer need not be the owner of the bill.

§ 2.

"Bill" "Note."

(*e*) The expression "Bill" means bill of exchange, and "Note" means promissory note;

A bill of exchange is defined in section 3, and a promissory note in section 82. The latter does not include bank notes. A cheque is defined in section 72 as a bill of exchange drawn on a bank, payable on demand. Where the word "Bill" is used in the Act, it includes a cheque, unless in case of some conflicting provision in Part III. It also includes a promissory note, unless found in some portion of the Act within the exceptions mentioned in section 88.

"Delivery."

(*f*) The expression "Delivery" means transfer of possession, actual or constructive, from one person to another;

A person has constructive possession of a bill when it is in the actual possession of his servant or agent on his behalf. Delivery does not always imply an actual transfer from one possessor to another. A person who holds a bill for another may become the owner of it himself; a person who holds a bill for himself may become the holder of it for another; a person who holds a bill for one party may become the holder of it for another. In each of these cases there is "delivery" without any actual change of possession, and a sufficient delivery to comply with the requirements of section 21, and make the contract of the drawer, acceptor or indorser, as the case may be, complete and irrevocable. Where bankers indorsed a note to a customer, and put it in an envelope with his papers, at the same time making appropriate entries of the transaction in their books, it was held to be a sufficient delivery to him, and that a subsequent assignment of the bankers could not defeat it: Williams v. Galt, 95 Ill. 172 (1880). For a definition of the word "person" see the Interpretation Act, R. S. C. c. 1, s. 7 (22).

"Holder."

(*g*) The expression "Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof;

§ 2. Holder.

The holder may or may not be the legal owner. It is sufficient for him to be in possession and entitled, at law, to recover or receive its contents from another: Daniel, § 28. If the payee or indorsee of a bill or note indorse it in blank and send it to another person for discount, collection, or some other special purpose, the latter, while in possession, would be the "holder" of the bill or note: Allison v. Central Bank, 9 N. B. (4 Allen) 270 (1859).

The rights and powers of the holder of a bill are given in section 38.

The word holder is used in different senses. It may mean a "holder in due course" as defined in section 29; and every holder of a bill or note is prima facie deemed to be a holder in due course: section 30, s-s. 2. This latter expression is used in the Act instead of the old phrase "bona fide holder for value without notice." The term "holder for value" is defined in section 27, s-s. 2.

The word holder also includes one whose possession is unlawful, but who can give a valid discharge to a person who pays the bill in good faith, or who can give a good title to a purchaser before maturity in good faith and for value, such as the finder of a bill payable to bearer or indorsed in blank: section 38; Murray v. Lardner, 2 Wall. 110 (1864).

A person who is in possession of a bill or note otherwise than as above stated is not a "holder" of it. Thus the possessor under a forged indorsement even for value and in good faith acquires no rights and is not entitled to the designation: section 24; Smith v. Union Bank, L. R. 10 Q. B. per Blackburn, J., at p. 296 (1875); Colson v. Arnot, 57 N. Y. 253 (1874).

The words "Property of the Eastern Townships Bank" stamped on the face of a note, without any signature attached, prove nothing in the absence of any evidence as to how the words were placed there: Demers v. Hogle. Q. R. 7 S. C. 476 (1895).

Every "bearer" of a bill within the meaning of the definition in clause (*d*) of this section, is the holder of it: Howard v. Godard, 9 N. B. (4 Allen) 452 (1860).

§ 2.

"Indorsement." (*h*) The expression "Indorsement" means an indorsement completed by delivery;

Indorsement, as its derivation and meaning would indicate, is generally made by writing the name of the transferrer on the back of the bill; but it may be written on any other portion of it. "It is quite immaterial whether the indorsement be written on the back of the instrument or on the face," as said by Lord Campbell in Young v. Glover, 3 Jur. N. S. 637 (1857). See also Partridge v. Davis, 20 Vt. 499 (1848); Herring v. Woodhull, 29 Ill. 92 (1862); Haines v. Dubois, 30 N. J. 259 (1863); Arnot v. Symonds, 85 Penn. St. 99 (1877). In certain cases it may be written on an allonge or on a copy of the bill: section 32 (*a*).

In the Act the word is not applied to this writing alone, but only when followed and completed by the delivery of the bill to another, which makes the contract of the indorser complete and irrevocable: section 21. Delivery is here used in the sense indicated in clause (*f*) of this section. The requisites of a valid indorsement to operate as a negotiation of a bill are set out in section 21.

An indorsement must be an assignment by somebody who has a right to assign, and if made by a stranger is no indorsement at all: Tai Yune v. Blum, 3 B. C. R. 21 (1893).

"Issue." (*i*) The expression "Issue" means the first delivery of a bill or note, complete in form, to a person who takes it as a holder;

"Issue" is used only a few times in the Act. Interest runs from the "issue" of an undated bill when it is expressed to be payable with interest, without saving from what time: section 9, s-s. 3. As to the effect of inserting a wrong date of issue when a bill has been issued undated, see section 12. As to the re-issue of a bill, see section 37. Where a bill drawn in one country is payable, negotiated or accepted in another, it may become of importance to determine the place of issue: section 71. A bill is complete in form when it complies with section 3, and a note when it complies with section 82

For the definition of "person," see the note at the end of the present section.

§ 2.

(*j*) The expression "Value" means valuable consideration; "Value."

The term "valuable consideration" is defined in section 27.

(*k*) The expression "Defence" includes counter-claim. "Defence.

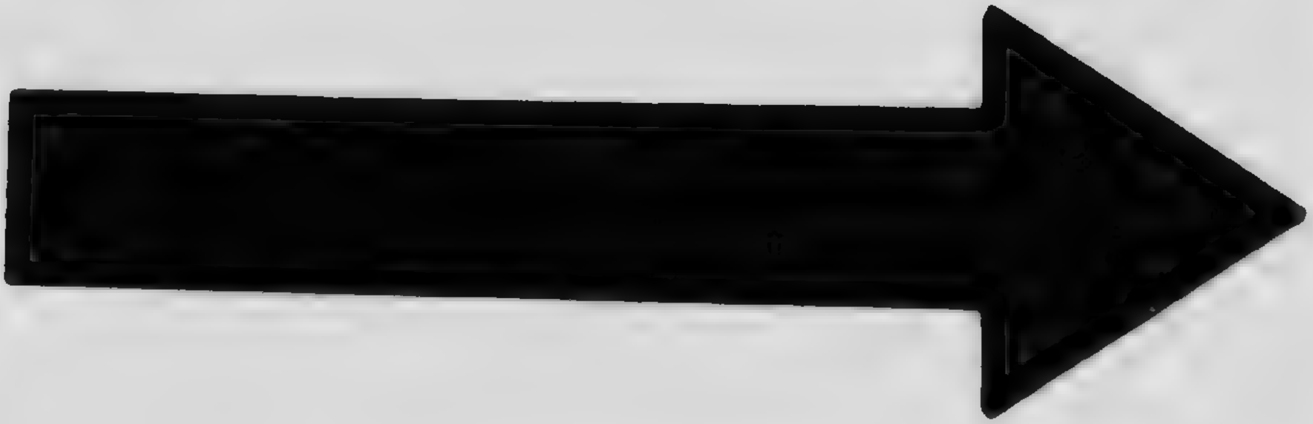
The word "defence" is used in sections 30, s-s. 5 and 38 (*b*). For a definition of counter-claim, see note to clause (*b*) of this section. "Defence" would also include in Quebec a cross demand by a defendant: C. C. P. Art. 217.

The foregoing definitions are taken from the corresponding section of the Imperial Act, almost without change. "Banker" in the Imperial Act has been replaced by "Bank" in the Canadian, for the reasons above mentioned. "Bankrupt" is not used in the Canadian Act, as we have no general bankrupt or insolvency law in force in the Dominion. "Person," "written" and "writing," which are all used in a peculiar sense, are defined in the Imperial Act, but not in the Canadian, as they are defined in the general Interpretation Act, R. S. C. c. 1, s. 7, as follows:

"(22) The expression 'person' includes any body corporate and politic, or party, and the heirs, executors, administrators or other legal representatives of such person, to whom the context can apply according to the law of that part of Canada to which such context extends."

"(23) The expression 'writing,' 'written,' or any term of like import, includes words printed, painted, engraved, lithographed, or otherwise traced or copied."

The only one of the foregoing definitions not in the Imperial Act is that of "defence." This section is another illustration of the fact that the original portions of the Canadian Act were not prepared or arranged with the same care as



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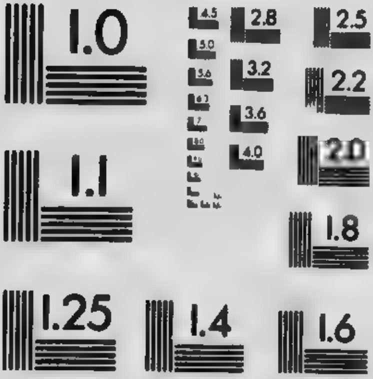

§ 2. must have characterized the preparation of the Imperial Act. In the latter the words defined are all arranged alphabetically. Those copied from it in the Canadian Act follow the same order; but the word "defence" which has been added, instead of being inserted in its proper alphabetical place, comes after "value." Another change which is scarcely an improvement, is the insertion of the words "The expression" at the commencement of each definition, while in the Imperial Act each clause begins with the word to be defined. If any prefix was thought necessary, it would have been more appropriate to have used "the word" rather than "the expression," as in each instance it is a single word that is defined.

PART II.

BILLS OF EXCHANGE.

The Act, as its title indicates, relates to Bills of Exchange, Cheques and Promissory Notes. The rules and principles relating to the former are set out in Part II., which embraces sections 3 to 71 inclusive.

Section 72 defines a cheque as a bill of exchange drawn on a bank payable on demand, and enacts that the provisions of the Act applicable to a bill of exchange payable on demand shall apply to a cheque, except as otherwise provided in Part III.

By section 88 the provisions of the Act relating to bills of exchange apply to promissory notes with the necessary modifications, and subject to the exceptions of that section and the provisions of Part IV.

In the notes and illustrations appended to the various sections of Part II. of the Act, where a clause or provision is equally applicable to a promissory note or cheque as well as to a bill, authorities and cases bearing upon the principle will be cited, although they may have been laid down or decided with reference to notes or cheques.

FORM AND INTERPRETATION.

3. A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer: Imp. Act, s. 3 (1). Bill of Exchange defined.

§ 3.

Bill defined.

The foregoing clause is copied from the Imperial Act without change. Probably no definition of a bill of exchange has yet been given which is not open to criticism. The present one is not the most felicitous, as will be seen on comparing it with the second part of the section.

This definition also includes a cheque and is declaratory of the former law: McLean v. Clydesdale Banking Co., 9 App. Cas., per Lord Blackburn, at p. 106 (1883).

The following were the provisions on the subject contained in the Civil Code of Lower Canada: "Article 2279. A bill of exchange is a written order by one person to another for the payment of money absolutely and at all events.—Article 2280. It is essential to a bill of exchange: That it be in writing and contain the signature or name of the drawer; That it be for the payment of a specific sum of money only; That it be payable at all events without any condition."

The definition in the Code is taken from Kent's Commentaries, vol. 3, p. 74. Kent copies it from Bayley on Bills, p. 1, and speaks of it as "a concise, clear and accurate production." Blackstone says a bill of exchange is "an open letter of request from one man to another desiring him to pay a sum of money therein named to a third person on his account": 2 Comm. 466. Chitty follows Blackstone. For a very full list of the different definitions given by various authors, see 1 Randolph, § 3, note.

In France the law governing bills of exchange differs in some important particulars from that of England, as it may be seen from the following definition taken from the Code de Commerce, Art. 110:—"A bill of exchange is drawn from one place on another. It is dated. It sets forth, the sum to be paid; the name of the person who is to pay; the time and place of payment; the value given in money, goods, account or otherwise. It is payable to the order of a third party, or of the drawer himself. It must state whether it be the first, second, third, or fourth, etc., of the same tenor and contents."

§ 3.

Bill defined.

The New York Negotiable Instruments Law, which has been adopted by twenty-one other States, and the district of Columbia, lays down the following rules as to the form of a negotiable instrument: "§ 20. An instrument to be negotiable must conform to the following requirements: 1. It must be in writing and signed by the maker or drawer. 2. Must contain an unconditional promise or order to pay a sum certain in money. 3. Must be payable on demand or at a fixed or determinable future time. 4. Must be payable to order or to bearer; and 5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty."

A bill of exchange is sometimes called a draft, and after it has been accepted, sometimes an acceptance. It may be in any language, and in any form of words that complies with the requirements of the foregoing definition or the provisions of the Act. Where an instrument is so ambiguous as to make it doubtful whether it is a bill of exchange or a promissory note, the holder may, as against the maker, treat it as either: Edis v. Bury, 6 B. & C. 433 (1827); Forbes v. Marshall, 11 Ex. 166 (1855); Fielder v. Marshall, 9 C. B. N. S. 606 (1861).

"An Unconditional Order."—A bill of exchange is a order, and is in its nature the demand of a right, not the mei asking of a favor, and therefore a supplication made, or authority given to pay an amount is not a bill: Daniel, § 35. The person addressed is "required" to pay the sum named. The insertion of mere terms of courtesy, however, will not destroy its validity. It seems impossible to reconcile the conflicting decision on this point. The same may be said to be true as to what orders have been held to be "unconditional." As to an instrument payable on a contingency, see section 11 and the notes and illustrations thereunder. A promissory note is an unconditional promise to pay: section 82. For illustrations of irregular instruments in this respect, see notes under that section.

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ILLUSTRATIONS.

The following have been held to be valid bills:—

1. "Mr. Warren, please let the bearer, William Tuke, have the amount of £10, and you will oblige me, B. B. Mitchell": Reg. v. Tuke, 17 U. C. Q. B. 296 (1858).

2. "Mr. Nelson will much oblige Mr. Webb by paying J. Ruff, or order, on his account, twenty guineas": Ruff v. Webb. 1 Esp. 129 (1794).

3. "To the Cashier,—Credit P. & Co., or order, with £500, claimed, per Cleopatra, in cash, on account of this corporation, A. C., Managing Director": Ellison v. Collingridge, 9 C. B. 570 (1850); Allen v. The Sea Fire and Life Assurance Co., 9 C. B. 574 (1850).

4. An order written under a note "Please pay the above note, and hold it against me in our settlement": Leonard v. Mason, 1 Wend. 522 (1828).

5. Also a like order written under an account: Hoyt v. Lynch, 2 Sandf. 328 (1847).

6. "Please let the bearer have $50. I will arrange it with you this forenoon. Yours truly": Bresenthal v. Williams, 1 Duval, 329 (1864).

The following have been held not to be valid bills:—

1. An open letter from one Government officer to another desiring the latter to pay plaintiff a certain sum of money due him by the department: McLean v. Ross, 3 Rev. de Leg. 434 (1816).

2. "Please to send £10 by bearer, as I am so ill I cannot wait upon you": Rex v. Ellor, 1 Leach, 323 (1874).

3. "Mr. L., please to let the bearer have £7, and place it to my account, and you will much oblige your humble servant, S.": Little v. Slackford, 1 M. & M. 371 (1828).

4. A note written by the creditor to his debtor at the foot of the creditor's account requesting the debtor to pay the account to the creditor's agent: Norris v. Solomon, 2 M. & Rob. 266 (1840).

5. "To E. & S.—We hereby authorize you to pay on our account to the order of G. £6,000, W. & S.": Hamilton v. Spottiswoode, 4 Ex. 200 (1849).

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"In Writin.—Writing, as defined in the Interpretation Act, R. S. C. c. 1, s. 7 (23), "includes words printed, painted, engraved, lithographed, or otherwise traced or copied." It is not material whether the writing be in pencil or ink, though as a matter of permanence and security ink is of course preferable. A writing in pencil is within the meaning of that term at common law, and within the custom of merchants: Geary v. Physic, 5 B. & C., per Bayley, J., at p. 238 (1826). See also Jeffery v. Walton, 1 Stark. 267 (1816); Rymes v. Clarkson, 1 Phil. 22 (1809); Dickenson v. Dickenson, 2 Phil. 173 (1814).

Cannot be varied by parol.

It is a general rule of law that contracts in writing cannot be varied by extrinsic evidence of the intention of the parties: Burges v. Wickham, 3 B. & S. 669 (1863); Taylor, § 1132; or as it is put in the Civil Code, Art. 1234, "Testimony cannot in any case be received to contradict or vary the terms of a valid written instrument." According to this rule the contracts of the parties to bills of exchange and promissory notes as appearing upon the face of the instrument, whether of drawer, acceptor, maker or indorser, cannot be varied by parol evidence: Hart v. Davy, 1 U. C. Q. B. 218 (1843); Ewart v. Weller, 5 ibid. 610 (1849); Adams v. Thomas, 7 ibid. 249 (1850); Davis v. McSherry, ibid. 490 (1850); Hall v. Francis, 4 U. C. C. P. 210 (1854); Hammond v. Small, 16 U. C. Q. B. 371 (1858); Armour v. Gates, 8 U. C. C. P. 548 (1859); Street v. Beckwith, 20 U. C. Q. B. 9 (1860); Moore v. Sullivan, 21 ibid. 445 (1862); Chamberlin v. Ball, 5 L. C. J. 88 (1860); Scott v. Quebec Bank, 7 L. N. 343 (1884); Decelles v. Samoisette, M. L. R. 4 S. C. 361 (1888); Inglis v. Allen, 7 N. S. (1 G. & O.) 101 (1867); Graham v. Graham, 11 N. S. (2 R. & C.) 265 (1877); Taylor v. McFarlane, 12 N. S. (3 R. & C.) 190 (1878); Smith v. Squires, 13 Man. 360 (1901); Emerson v. Erwin, 10 B. C. R. 101 (1903).

Illustrations.

Thus in an action brought upon a bill or note, it is not admissible to prove that at the time of making it was agreed verbally that the bill or note should be renewed or not paid at

§ 3. maturity: Bradbury v. Oliver, 5 U. C. O. S. 703 (1839); Durand v. Stevenson, 5 U. C. Q. B. 336 (1849); Hayes v. Davis, 6 ibid. 396 (1849); McQueen v. McQueen, 9 ibid. 536 (1852); Bank of Upper Canada v. Jones, 1 U. C. Pr. R. 185 (1854); Harper v. Paterson, 14 U. C. C. P. 538 (1864); Vidal v. Ford, 19 U. C. Q. B. 88 (1859); Porteous v. Muir, 8 O. R. 127 (1885); Letellier v. Cantin, Q. R. 11 S. C. 64 (1896); Imperial Bank v. Brydon, 2 Man. 117 (1885); Young v. Austen, L. R. 4 C. P. 553 (1869); New London Credit Syndicate v. Neale, [1898] 2 Q. B. 487; or, that the instrument expressed to be payable at a certain time should be payable only in a given event: Harvey v. Geary, 1 U. C. Q. B. 483 (1845); Reed v. Reed, 11 ibid. 26 (1853); Royal Canadian Bank v. Minaker, 19 U. C. C. P. 219 (1869); Stultzman v. Yeagley, 32 U. C. Q. B. 630 (1872); Moore v. Grosvenor, 30 N. B. 221 (1890); Foster v. Jolly, 1 C. M. & R. 703 (1835); Heslop v. Phillips, 24 V. L. R. 498 (1898); or that it should be payable by instalments or in any other manner than expressed in the instrument: Besant v. Cross, 10 C. B. 895 (1851); or, that a note payable on demand should not be payable until the death of the maker: Woodbridge v. Spooner, 3 B. & Ald. 233 (1819); or, that it should be only to secure the payment of interest during the life of the payee: Hill v. Wilson, L. R. 8 Ch. 888 (1873); or, that an indorser at the time of indorsing had agreed to waive his right to have notice of dishonor: Free v. Hawkins, 8 Taunt. 92 (1317); Leake on Contracts, p. 122; or that the maker was not to be liable beyond the amount of money received by him: Conley v. Ashley, 2 O. W. R. 704 (1902).

Exceptions.

But parol evidence is admissible to show that the date of the bill or note is not the true date: section 13; or, that the delivery is incomplete and conditional only so that the contract is not operative: section 21 s.-s. 3; or, to impeach the consideration for the contract: Northfield v. Lawrance, M. L. R. 7 S. C. 148 (1891); Abrey v. Crux, L. R. 5 C. P. 37 (1869); Downie v. Francis, 30 L. C. J. 22 (1885); Fisher v. Archibald, 8 N. S. (2 G. & O.) 298 (1871); Black v. Gesner, 3 N. S. (2 Thom.) 157 (1847); Gray v. Whitman, ibid.

(1857); Lindsay v. Zwicker, 8 N. S. (2 G. & O.) 100 (1870); or to show (after complete performance) that when the note was made there was an oral agreement that if the maker paid interest to the payee and supported for life a relative of the latter, the note should be considered paid: McQuarrie v. Brand, 28 O. R. 69 (1896); or to show that the contract has been discharged by payment, release or otherwise: Carden v. Finley, 8 L. C. J. 139 (1860); Phillips v. Sanborn, 6 ibid. 252 (1862); Gole v. Cockburn, 8 ibid. 341 (1864), Lalone v. Rolland, 10 ibid. 321 (1864): Converse v. Brown, 10 ibid. 196 (1865); Hamilton v. Perry. Q. R. 5 S. C. 76 (1894); Moore v. Grosvenor, 30 N. B. 221 (1890); Foster v. Dawber, 6 Exch. 839 (1851); Walker v. Johnson, 6 N. Z. L. R. 41 (1880); but see now section 61.

Parol.

In an Australian case. Bank of South Australia v. Williams, 19 V. L. R. 514 (1893), it was held that parol evidence was admissible to show that plaintiff agreed at the time of the making of the note that the maker should not be liable on it. The authorities chiefly relied upon were Goss v. Nugent, 5 B. & Ad. 58 (1833), and Foster v. Dawber, 6 Exch. 839 (1851). The decision, however, is open to question, especially in view of the principle adopted in section 61 of the Act. A contemporaneous agreement in writing referring to a bill or note between the same parties may be binding: Jenkins v. Bossom. 13 N. S. (1 R. & G.) 540 (1880); Young v. Austen, supra; Brown v. Langley, 4 M. & Gr. 466 (1842); Salmon v. Webb, 3 H. L. Cas. 510 (1852); Lindley v. Lacy, 17 C. B. N. S. 578 (1864); Maillard v. Page, L. R. 5 Ex. 312 (1870); but the mere fact that a bill or note refers to a collateral writing or agreement which is conditional in its terms will not affect the bill in the hands of a holder without notice of its contents: Jury v. Barker, E. B. & E. 459 (1858); Taylor v. Curry, 109 Mass. 36 (1871).

"Addressed by One Person to Another."—"Person" here includes any body corporate and politic, party, and the representatives of such person. or any number of persons: R. S. C. c. 1, s. 7 (21) and (22). The person addressing the

§ 3. bill is called the drawer, and the one addressed, the drawee. After acceptance of the bill the latter is called the acceptor. This part of the definition is not strictly complied with when the drawer and drawee are the same person, or when the drawee is a fictitious person: section 5, s.-s. 2. The holder may treat such an instrument as a bill or note at his option. An instrument regular in form, except that it is not addressed to any drawee, is not a bill of exchange: Forward v. Thompson, 12 U. C. Q. B. 103 (1854); McPherson v. Johnston, 3 B. C. R. 465 (1894). The drawee need not be named; it is sufficient that he be described with reasonable certainty, so that the bill can be duly presented to the proper person: section 6.

A warrant in the form of a bill of exchange, signed by a committee of a city council and addressed to the city treasurer is not a bill of exchange, as the drawer and drawee really represent the same person: Charlebois v. Montreal, Q. R. 15 S. C. 96 (1898). For the same reason a draft drawn by one branch of a bank on another branch of the same bank is not a bill or cheque: Capital & Counties Bank v. Gordon, [1903] A. C. 240.

"**Signed.**"—The instrument is not a bill of exchange until signed by the drawer. He may sign a blank paper which may be subsequently filled up: section 20; or it may be accepted first and signed by the drawer afterwards: section 18. Even if accepted it is not a bill if it lack the drawer's signature: McCall v. Taylor, 19 C. B. N. S. 301 (1865); Reg. v. Harper, 7 Q. B. D. 78 (1881); but if still in his hands it may be a security for the payment of money within section 75 of the Imperial Larceny Act, 1861: Reg. v. Bowerman, [1891] 1 Q. B. 112; or within section 326 (*d*), or section 353 of the Criminal Code, 1892.

It may be signed in pencil: Geary v. Physic, 5 B. & C. 234 (1826); Brown v. Butchers' Bank, 6 Hill 443 (1844); Closson v. Stearns, 4 Vt. 11 (1831); Reed v. Roark, 14 Tex. 329 (1855); or with a cross or mark: Noad v. Chateauvert, 1 Rev. de Leg. 229 (1846); Paterson v. Pain, 1 L. C. R. 219

(1851); Thurber v. Deseve, M. C. R. 125 (1854); Anderson v. Park, 6 L. C. R. 479 (1855); Collins v. Bradshaw, 10 ibid. 366 (1860); Coupal v. Coupal, 5 R. L. 465 (1873); Hubert v. Moreau, 12 Moore, 219 (1827); Baker v. Dening, 8 A. & E. 94 (1838); Re Bryce, 2 Curtis 325 (1839); Re Field, 3 Curtis, 752 (1843); Re [illegible]iss, 2 Robertson, 116 (1849); Willoughby v. Moulton, 47 N. H. 205 (1866) Shank v. Butsch, 28 Ind. 19 (1867). Contra, Lagueux v. Casault, 2 Rev. de Leg. 28 (1813), and Jones v. Hart, ibid. 58 (1819), overruled. Signing with a cross or mark is good even where the witness cannot sign and merely makes his mark: Remillard v. Moisan, Q. R. 15 S. C. 622 (1899).

Signature

In writter contracts of various kinds it has been held or intimated that the following were sufficient, where it was clear that the parties intended to adopt them as their signatures:—initials, a trade or assumed name, a stamp, or a printed or engraved signature. See Saunderson v. Jackson, 2 B. & P. 238 (1800); Phillimore v. Barry, 1 Camp. 513 (1808); Schneider v. Norris, 2 M. & S. 286 (1814); Hyde v. Johnson, 2 Bing. N. C. 780 (1836); Jacob v. Kirk, 2 M. & Rob. 221 (1839); Re Christian, 2 Robertson, 110 (1849); Re Hinds, 16 Jur. 1161 (1852); Caton v. Caton, L. R. 2 H. L. 143 (1867); Bennett v. Brumfitt, L. R. 3 C. P. 28 (1867); Ex parte Birmingham Banking Co., L. R. 3 Ch. 653 (1868); Merchants' Bank v. Spicer, 6 Wend. 443 (1831); Weston v. Myers, 33 Ill. 424 (1864); 1 Randolph, §§ 63, 64; 1 Daniel, § 74.

The signature of a party need not be written with his own hand; it is sufficient if it be by some other person by or under his authority: sections 25 and 90.

As to notarial promissory notes en brevet in Quebec, where the maker neither signs nor makes his mark, see note to section 82.

In the case of a corporation, the seal alone would be sufficient; but a seal is not necessary or even usual: section 90, s.-s. 2. Bills of a company incorporated under the general Act or by letters patent may be drawn by any agent, officer,

§ 3. or servant in general accordance with his powers under the by-laws: R. S. C. c. 118, s. 35; c. 119, s. 76.

The drawer usually signs at the foot of the bill, but his signature may be in the body of it or on any part so long as he signs as drawer: Byles, p. 97.

"On demand, or at a fixed or determinable future time."—Every bill of exchange falls under one or other of the above classes. The words are used in a special or technical sense and are explained respectively in sections 10 and 11. See these sections and the notes and illustrations under them. Bills are usually made payable "on demand" or "at sight," or a certain time "after date" or "after sight."

"A sum certain in Money."—A sum is certain within the meaning of the Act although payable with interest, or by stated instalments, or according to a certain rate of exchange: section 9. It must be for money alone; but it may be in the money of any country: Chitty on Bills, 153. A promissory note must also be for a sum certain in money: section 82. Money is not defined in the Act, and is used in its ordinary sense.

"What is Money?—It is not necessarily either gold, silver or paper. It is just what the people of the country where the instrument is made choose to treat as money, in other words, as currency. If the note be for the payment of what is deemed money, it is wholly immaterial in the money of what country the note is payable": Third National Bank v. Cosby, 41 U. C. Q. B., per Harrison, C.J., at p. 408 (1877). Money in Canada would be specie or Dominion notes: see R. S. C. c. 30, an Act respecting the currency; and c. 31, an Act respecting Dominion Notes. A cheque given by the purchaser of an insolvent's stock to the banker of the insolvent held to be a payment of money within the Assignment Act: Gordon v. Union Bank, 26 A. R. 155 (1899).

In the United States words of description prefixed to the word "money" have been held not to vitiate the instrument containing them, nor the addition of the words "gold"

or "specie." Under the judgment of the Supreme Court of the United States in the Legal Tender cases, it makes no difference if a note be made payable in any particular kind of money, as gold or silver, any money obligation can be discharged by legal tender notes: Legal Tender cases, 12 Wall. 457 (1870). This doctrine was re-affirmed in Dooley v. Smith, 13 Wall. 605 (1871); Bigler v. Waller, 14 Wall. 298 (1871); and Railroad Co. v. Johnson, 15 Wall. 195 (1872). Notes payable in "current funds" and in "currency" have been held in many States to be promissory notes payable in money. § 3.

ILLUSTRATIONS.

The following have been held to be valid bills or notes as being for a sum certain in money:

1. A note made in Canada promising to pay at Chicago "$893, American currency": Third National Bank v. Cosby, 41 U. C. Q. B. 402 (1877).

2. "To P.—Please pay to H. the sum of $138.40 for flooring supplied to your buildings on D. road and charge to my account." Hall v. Prittie, 17 Ont. A. R. 306 (1890).

3. A promise to pay in cash or goods if the holder chooses to demand the former: McDonell v. Holgate, 2 Rev. de Leg. 29 (1818). But see Nos. 3, 4 and 14, post.

4. A note payable in American silver at par, before the proclamation declaring such silver uncurrent: Joseph v. Turcotte, 2 R. C. 479 (1871).

5. A note made in Nova Scotia promising to pay a sum of money in Boston "in currency": Souther v. Wallace, 20 N. S. 509 (1888). Affirmed in the Supreme Court of Canada, where it was held that "It is no objection to the validity of a promissory note that it is for the payment of a certain sum in currency, which must be held to mean United States currency when the note is payable in the United States": 16 S. C. Can. 717 (1889).

6. A note made in New Brunswick promising to pay "$——, payable in United States currency": St. Stephen Ry. Co. v. Black, 13 N. B. (2 Han.) 139 (1870).

7. A note payable "in bankable currency": Dunn v. Allen, 24 N. B. 1 (1884).

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8. A note payable "in legal tender money": North-Western National Bank v. Jarvis, 2 Man. 53 (1883).

9. A note payable "in Canadian currency": Black v. Ward, 27 Mich. 193 (1873).

The following instruments have been held not to be valid bills or notes:—

1. A promise to pay £14 "in carpenter's or joiner's work as required": Downs v. McNamara, 3 U. C. Q. B. 276 (1846).

2. A promise to pay £83 in ten days for value received, with a memorandum indorsed, when made, that it was to be "paid by a mortgage": Newhorn v. Lawrence, 5 U. C. Q. B. 359 (1848).

3. A promise to pay £25 "in cash or mortgage," even in case of election to pay in cash: Going v. Barwick, 16 U. C. Q. B. 45 (1857).

4. A promissory note at six months for $400, with a memorandum that it is to be paid in lumber, and if not so paid within the time, then in cash: Boulton v. Jones, 19 U. C. Q. B. 517 (1860).

5. A promise to pay in Kingston, Canada, £72 "with exchange on New York": Palmer v. Fahnestock, 9 U. C. C. P. 172 (1859).

6. A promise dated in the United States to pay bearer "$482 in Canada bills": Gray v. Worden, 29 U. C. Q. B. 535 (1870).

7. A promise to pay in Cobourg, Canada, $200, in current funds of the United States: Bettis v. Weller, 30 U. C. Q. B. 23 (1870)—Overruled: Third National Bank v. Cosby, 43 ibid at p. 69 (1878).

8. A promise to pay at Auburn, N.Y., $3,361 "with exchange not to exceed one-half per cent.": Saxton v. Stevenson, 23 U. C. C. P. 503 (1874).

9. An order to pay $400 "with current rate of exchange on New York": Cazet v. Kirk, 9 N. B. (4 Allen) 543, (1860). But see now section 9 (*d*).

10. An order by A. on B. requesting him to pay K. "the amount of my account furnished," on which B. had written "Correct for say $75" and had initialled it: Kennedy v. Adams, 15 N. B. (2 Pugs.) 162 (1874).

11. "I will pay J. C. $90 for D. V. or otherwise settle the sum of $90 for him on a note that he says he gave J. C. for $100": Cochrane v. Caie, 16 N. B. (3 Pugs.) 224 (1875).

12. A promise to pay a sum "to collaterally secure the payment of the money mentioned in an assignment of mortgage": McRobbie v. Torrance, 5 Man. 114 (1888). § 3.

13. An order requiring payment in good East India Bonds: Buller, N. P., p. 268.

14. An order to pay "in cash or Bank of England notes": Ex parte Imeson, 2 Rose, 225 (1815). This was prior to 3 & 4 Wm. IV., c. 98, s. 5, making these notes a legal tender.

15. An order to pay the proceeds of a shipment of goods, value about £2,000: Jones v. Simpson, 2 B. & C. 318 (1823).

16. An order requiring payment of "the balance due to me for building the Baptist College Chapel": Crowfoot v. Gurney, 9 Bing. 372 (1832).

17. A promise to pay £695 in four instalments, 3 of £200 each, and the balance, £95, to go as a set-off for an order: Davies v. Wilkinson, 10 A. & E. 98 (1839).

18. A promise to pay in current bank bills or notes: McCormick v. Trotter, 10 Serg. & R. 94 (1823).

19. A promise to pay "in office notes of a bank": Irvine v. Lowry, 14 Peters (U. S.) 293 (1840).

20. A promise in New York to pay "in Canadian currency": Thompson v. Sloan, 23 Wend. (N. Y.) 71 (1840).

See also notes and cases under section 82.

"A specified Person."—The person to whom or to whose order a bill is made payable is called the payee. As to the necessity for the payee being clearly specified when the bill is payable by order, see section 7. The payee may be the same person as the drawer or the drawee or a fictitious person: section 5. As to the change in the law making negotiable a bill payable to a specified person, and not to his order, see notes on section 8, s.-s. 4. "Person" is here used in the wide sense of the Interpretation Act, R. S. C. c. 1, s. 7 (22), and includes corporations, partnerships, etc.

"Bearer."—A bill payable "to John Smith or bearer" is a bill payable to bearer. All persons except chartered banks are prohibited under a penalty of $400 from issuing,

§ 3. making, drawing, or indorsing any bill, note, or cheque intended to circulate as money; and such intention is presumed if the sum is less than $20, and the instrument is payable to bearer, or at sight, or on demand, or within 30 days, unless given by the maker directly to his immediate creditor: Bank Act, 53 Vict. c. 31, s. 60. Companies incorporated by special Dominion Act, to which the general Act applies, or by letters patent, are prohibited from issuing a note payable to bearer or intended to circulate as money: R. S. C. c. 118, s. 35; c. 119, s. 76. Companies incorporated by special Acts or by letters patent in most of the provinces are subject to a like disability: R. S. Q. Arts. 4689 and 4746; R. S. Man. c. 30, s. 64; R. S. B. C. c. 44, s. 27; Cons. Ord. N.-W. T. c. 61, s. 79. They may apparently accept bills payable to bearer, except such as come within the foregoing prohibition in the Bank Act. In France a bill cannot be drawn payable to bearer, but must be to the order of a third party or of the drawer himself: Code de Com. Art. 110.

When instrument is not such bill.

2. An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not, except as hereinafter provided, a bill of exchange: Imp. Act, s. 3 (2).

"Except as hereinafter provided."—These words are not in the Imperial Act, and it is doubtful if they serve any useful purpose. They were not in the bill as introduced, but were inserted in the House of Commons ostensibly to meet the case of a bill payable with exchange (section 9 (*d*)), which was assumed not to be for a sum certain: Commons Debates, 1889, p. 778. That section, however, declares such a bill to be for a sum certain, within the meaning of the Act. Probably the only instruments recognized as bills by the Act which do not fairly come within the definition in the first clause of this section are those in which the drawer and the drawee are the same person, which, strictly speaking, are not addressed by one person to another.

The use of the word "conditions" here is not the most felicitous, in view of the use of "unconditional" in the definition; but it is the order to pay that must be unconditional. § 3.

The following are examples of instruments held not to be valid bills or notes on account of their ordering or promising some act to be done in addition to the payment of money.

ILLUSTRATIONS.

1. An instrument in the form of a note, with the following clause added: "This note to be held as collateral security": Hall v. Merrick, 40 U. C. Q. B. 566 (1877).

2. A note payable in 3 years, with the following words added: "This note is given as collateral security for a guarantee of $5,000 given to John Sutherland by Alexander Sutherland": Sutherland v. Patterson, 4 O. R. 565 (1884).

3. An instrument in the form of a promissory note with the following clause added: "The title and right to the possession of the property for which this note is given shall remain in (the vendors) until this note is paid": Dominion Bank v. Wiggins, 21 Ont. A. R. 275 (1894); Prescott v. Garland, 34 N. B. 291 (1897); Bank of Hamilton v. Gillies, 12 Man. 495 (1899); Imperial Bank v. Bromish (N. W. T.), 16 C. L. T. 21 (1895). Contra, Merchants' Bank v. Dunlop, 9 Man. 623 (1894); Chicago Railway Equipment Co. v. Merchants' Bank, 136 U. S. 269 (1890).

4. A promise to pay a certain sum, half in cash and half in goods: Gillin v. Cutler, 1 L. C. J. 277 (1857); Burnham v. Watts, 4 N. B. (2 Kerr) 377 (1844).

5. An instrument promising to pay £25 for a mare by instalments, and further to give a mortgage on a day named, and if this were not given the whole amount should be payable at once: Coté v. Lemieux, 9 L. C. R. 221 (1859).

6. An order on defendant to pay £5 "half cash and half goods": Melville v. Beddell, Stevens' N. B. Digest, p. 95 (1832).

7. A promise to pay a sum of money on a particular day, and deliver up horses and a wharf: Martin v. Chauntry, 2 Str. 1271 (1747).

8. A promise to pay £65, "and also all other sums which may be due": Smith v. Nightingale, 2 Stark. 375 (1818).

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9. A promise to pay £1,200, "this being intended to stand as a set-off to a legacy": Clarke v. Percival, 2 B. & Ad. 660 (1831).

10. A promise to pay £30, and the demands of the sick club: Bolton v. Dugdale, 4 B. & Ad. 619 (1833).

11. A promise to pay £10 and all fines according to rule: Ayrey v. Fearnsides, 4 M. & W. 168 (1838).

12. A covenant to pay contained in a mortgage: Davies v. Herbert, 11 V. L. R. 386 (1885).

13. An order requiring payment of a certain sum, "and to take up a note for the drawer": Irvine v. Lowry, 14 Peters (U. S.) 293 (1840).

14. An order for "$800, and such additional premiums as may be due on policy No. 218,171": Marrett v. Equitable Ins. Co., 54 Maine, 537 (1867).

Unconditional order defined.

3. An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (*a*) an indication of a particular fund out of which the drawee is to re-imburse himself, or a particular account to be debited with the amount, or (*b*) a statement of the transaction which gives rise to the bill, is unconditional: Imp. Act, s. 3 (1).

An order to pay out of a particular fund is not a bill, being conditional, as the fund may prove inadequate. It may, however, be a valid assignment of the fund, or a part of it, and operate without an acceptance by the debtor. A bill may be accepted, payable out of a certain fund. As will be seen from the following illustrations, the decisions have not been consistent as to whether a particular bill should fall within the first or the second of the classes indicated in the above clause.

ILLUSTRATIONS.

The following have been held not to be bills or notes, as being payable out of a particular fund:—

1. An order for £25, payable out of S.'s money: Ockerman v. Blacklock, 12 U. C. C. P. 362 (1862).

2. An order to pay £125, "on account of the plaintiff's claim in this suit": Corp. of Perth v. McGregor, 21 U. C. Q. B. 459 (1862).

3. An order to pay $306 "out of certificate of money due me on the first of June, for material furnished to above church": Bank of B. N. A. v. Gibson, 21 O. R. 613 (1892).

4. An order to pay "out of the first moneys received by you on my account": Fullerton v. Chapman, 8 N. S. (2 G. & O.) 470 (1871).

5. An order by a captain for £420, as being the full amount of freight for the voyage: Brett v. Lovett, 8 N. S. (2 G. & O.) 472 (1871).

6. An order to pay £7 "out of my growing substance": Josselyn v. Lacier, 10 Mod. 294 (1715).

7. An order to pay "out of the moneys arising from my reversion": Carlos v. Fancourt, 5 T. R. 482 (1794).

8. "To B.—I do hereby order, authorize and request you to pay to R. £—— out of moneys due or to become due from you to me, and his receipt for same shall be a good discharge. G.": Brice v. Bannister, 3 Q. B. D. 569 (1878); see Buck v. Robson, ibid. 686 (1878).

9. A promise to pay out of the net proceeds of ore: Worden v. Dodge, 4 Denio (N. Y.) 159 (1847); Morton v. Naylor, 1 Hill (N. Y.) 583 (1841); Gallery v. Prindle, 14 Barb. (N.Y.) 186 (1851).

10. An order to pay $—— "and deduct the same from my share of the profits of the partnership": Munger v. Shannon, 61 N. Y. 251 (1874).

The following have been held to be valid bills and notes as coming within the rule in the latter part of the above subsection:—

1. A promise to pay $150, with the clause added, "which when paid is to be indorsed on the mortgage bearing even date herewith": Chesney v. St. John, 4 Ont. A. R. 150 (1879).

2. A promise to pay, with a memorandum that the note was given for insurance premiums: Wood v. Shaw, 3 L. C. J. 169 (1858).

3. An order to pay on account of wine had of the drawer: Buller v. Cripps, 6 Mod. 29 (1703).

4. An order to pay £9, "as my quarterly half pay, by advance": Macleod v. Snee, 2 Str. 762 (1728).

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5. A promise to pay £50, being a portion of a value as under deposited in security for the payment hereof: Haussoullier v. Hartsinck, 7 T. R. 733 (1798).

6. A promise to pay £16 "by giving up clothes and papers, etc."; these latter words being merely equivalent to "value received": Dixon v. Nuttall, 6 C. & P. 320 (1834).

7. An order to pay £600 "on account of moneys advanced by me for the F. Co.": Griffin v. Weatherby, L. R. 3 Q. B. 753 (1868).

8. An order for £3,374 "against credit No. 20, and place it to account as advised": Banner v. Johnston, L. R. 5 H. L. 157 (1871).

9. An order to pay $200 out of moneys which would become payable on the completion of a contract: Ex parte Shellard, L. R. 17 Eq. 109 (1873). Disapproved in Buck v. Robson, 3 Q. B. D. 686 (1878).

10. An order for £7,000, "which is on account of dividends and which charge to my account according to a registered letter I have addressed to you": Re Boyse. Crofton v. Crofton, 33 Ch. D. 612 (1886).

11. "To the trustees of the estate of T.—Please pay to C. the sum of £208, being the amount of two promissory notes given by me to him for meat. Jan. 20th, 1886. A. B.": Camp v. King, 14 V. L. R. 22 (1887).

Bill not invalid for reason specified.

4. A bill is not invalid by reason—

(*a*) That it is not dated: Imp. Act, s. 3 (4) (*a*).

A bill without a date is irregular, although not invalid. If issued undated and payable at a fixed period after date, any holder may insert the true date of issue and it shall be payable accordingly: section 12. It is presumed to be dated on the day it is made: Hague v. French, 3 B. & P. 173 (1802); Giles v. Bourne, 6 M. & S. 73 (1817); and proof of this may be made by parol: Davis v. Jones, 17 C. B. 625 (1856). Although not an essential part of a bill the date is a material part, and when altered without proper assent renders the bill void: section 63. In France a bill must be dated or it is invalid: Code de Com. Art. 110.

(*b*) That it does not specify the value given, or that any value has been given therefor: Imp. Act, s. 3 (4) (*b*).

§ 3.

Formerly the words "value received" or some words implying consideration were necessary: Byles, p. 95; Randolph, § 159. By the Civil Code of Lower Canada, Article 2285, when a bill contains the words "value received" value for the amount of it is presumed to have been received on the bill and upon the indorsements thereon: Larocque v. Franklin County Bank, 8 L. C. R. 328 (1858); Walters v. Mahan, 6 L. N. 316 (1883). Even where the words are in a bill, parol evidence may be received to prove the contrary: Davis v. McSherry, 7 U. C. Q. B. 490 (1850); Baxter v. Bilodeau, 9 Q. L. R. 268 (1883); Abbott v. Hendricks, 1 M. & G. 791 (1840). In an accepted bill, payable to the order of the drawer, these words imply value received by the acceptor: Highmore v. Primrose, 5 M. & S. 65 (1816). If the bill be payable to a third party they imply value received by the drawer: Grant v. Da Costa, 3 M. & S. 351 (1815). In England these words have long been unnecessary: Hatch v. Trayes, 11 A. & E. 702 (1840). Value.

(*c*) That it does not specify the place where it is drawn or the place where it is payable: Imp. Act, s. 3 (4) (*c*).

The place where a bill is drawn is usually placed at the top before the date. If no place is specified the holder may treat it as an inland bill, even although drawn abroad: section 4. In France the place must be stated on the bill: Code de Com. Art. 110; Nouguier, §§ 93-105.

If no place of payment is specified it is payable generally. It may be payable at either of two places at the option of the holder: Pollard v. Herries, 3 B. & P. 335 (1803); Beeching v. Gower, Holt N. P. 313 (1816). An acceptance may name the place of payment: section 19 (2) (*a*). A change in the place of payment or the addition of a place of payment without the acceptor's assent is a material alteration, and may render the bill void: section 63, s-s. 2. In France the place of payment must be different from that where it is drawn, and there must be a possible rate of exchange between the

§ 4. two places: Code de Com. Art. 110; Nouguier, §§ 93-105. The tendency in France is towards a relaxation of this rule.

Inland and foreign bills.

4. An inland bill is a bill which is, or on the face of it purports to be (*a*) both drawn and payable within Canada, or (*b*) drawn within Canada upon some person resident therein. Any other bill is a foreign bill: Imp. Act, s. 4 (1).

This clause is taken from the Imperial Act, the only change being the substitution of "Canada" for the "British Islands." Prior to the passing of the Act, the different provinces were, as a rule, considered to be foreign to each other; but a note made in Upper Canada, payable in Montreal, was held to be payable generally under 7 Wm. IV. c. 5, and treated as an inland note: Bradbury v. Doole, 1 U. C. Q. B. 442 (1841). In a later case, however, a similar note was treated as a foreign note and proof of the Lower Canadian law received: McLellan v. McLellan, 17 U. C. C. P. 109 (1866).

In Quebec the Civil Code, Art. 2336, provided that bills drawn upon persons in Upper Canada, or any other of the British North American Colonies, and returned under protest for non-payment, were subject to four per cent. damages. Most of the other provinces had similar provisions. See Con. Stat. U. C. c. 42, s. 9; Rev. Stat. N. S. (3rd Series) c. 32, s. 1; 1 Rev. Stat. N. B. (1854) c. 116, s. 1; and Acts of P. E. I., 17 Geo. III. c. 5, s. 2. These damages were abolished by the Dominion Act, 38 V. c. 19, and only the amount of the bill, with the cost of noting and protest, interest, exchange and re-exchange, were to be recoverable after the 1st of July, 1875, on a bill drawn upon any person in the Dominion or Newfoundland.

The following are inland bills:

1. A bill drawn in Canada upon some person resident there and payable in Canada.

2. A bill drawn in Canada upon some person abroad but payable in Canada.

3. A bill drawn in Canada upon some person resident there but payable abroad. § 4.

4. A bill which on its face purports to come within any of the foregoing classes but which was actually drawn abroad though dated in Canada. Foreign bills.

The place of payment in any of the foregoing cases may be determined by the acceptance: section 19, 2 (*a*). If no place of payment is specified in a bill or acceptance it is payable at the address of the drawee or acceptor: section 45, s-s. 2 (*d*) (3). Forms of inland and also of foreign bills will be found in the Appendix.

It is sometimes of importance to determine whether a bill is an inland or a foreign one. The latter, when dishonored in any part of Canada by non-acceptance or non-payment, must be protested: section 48. In any other province than Quebec an inland bill need not be protested: section 51. The drawer, acceptor, and each indorser of a bill is a several and distinct contracting party, and the rights, duties, and liabilities of these parties respectively may vary according to the law of the place of issue, or of the place where such contract was made, or where it is to be performed. On this point see section 71. As to inland and foreign promissory notes, see section 82, s-s. 4, and 88, s-s. 4.

In the United States the different States are considered to be foreign to each other for the purposes of bills of exchange: Daniel, § 9.

ILLUSTRATIONS.

1. On a bill drawn in London, England, on defendant in Toronto, but accepted by him in London and payable there, plaintiff was allowed the current rate of exchange on the day it became due, and not merely 24s. 4d. in the £ sterling: Greatorex v. Score, 6 U. C. L. J. 212 (1860).

2. A bill in blank signed and endorsed in Ireland, sent to England where the blanks were filled up and the bill negotiated there, is a foreign bill: Snaith v. Mingay, 1 M. & S. 87 (1813).

3. A bill written and accepted in England and sent abroad to the drawer, who signed it there, is a foreign bill: Boehm v. Campbell, Gow 46 (1818).

§ 4. 4. A bill drawn in London upon Brussels and accepted there, but payable in London, is an inland bill: Amner v. Clark, 2 C. M. & R. 468 (1835).

5. A bill payable to order, drawn, accepted and payable in England, but indorsed in France, is an inland bill: Lebel v. Tucker, L. R. 3 Q. B 77 (1867).

6. A bill drawn and payable in England upon a Boston house and accepted in England by a partner of the Boston house, who was there at the time, held to be a foreign bill, as if accepted in Boston · Grimshaw v. Bender, 6 Mass. 157 (1800).

7. A bill drawn in one State and payable in another, is a foreign bill, although all parties are citizens of one State: Grafton Bank v Moore, 14 N. H. 142 (1843).

If not noted as foreign.

2. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill. Imp. Act, s. 4 (2).

This is given by Chalmers as new law. He says, p. 16: "The result appears to be that though a bill purports to be a foreign bill, the holder may nevertheless show that it is in fact an inland bill for the purpose of excusing protest; while if it purports to be an inland bill, though really a foreign bill, he may treat it at his option as either."

The former part of this quotation appears to be clear; not however from sub-section 2 of section 4, but from the first part of the section, which declares that to be an inland bill which is drawn and payable within Canada, or is drawn within Canada upon some person resident therein. If actually drawn within Canada it may be treated as an inland bill although dated abroad. The second part of the above quotation does not appear to be authorized by any part of the section. The most obvious meaning of sub-section 2 would appear to be the same as that part of the first sub-section which declares that to be an inland bill which on its face purports to be drawn within Canada although actually drawn abroad, and which meets the other requisites of an inland bill.

5. A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee: Imp. Act, s. 5 (1). § 5. If different parties to bill are the same person.

Usually there are three distinct parties to a bill, the drawer, the drawee and the payee. In the above cases there are only two parties. In the first instance the drawer and the payee are the same person. This is a form of bill or draft long in use, and frequently adopted: Butler v. Crips, 1 Salk. 150 (1704). Such an instrument may be treated either as a bill of exchange or as a promissory note: Golding v. Waterhouse, 16 N. B. (3 Pugs.) 313 (1876). In the second instance the drawee and the payee are the same. This is a more uncommon form, and may be used when the drawee acts for himself, and also as agent for another person interested in the bill, or when he acts as agent for two different persons: Pardessus, Droit Commercial, § 339. In this case he is, in the language of Pothier, at the same time, acceptans et praesentans: Change, No. 19.

In such cases the bill can not be enforced until the acceptor has endorsed and delivered it to some other person: Reg. v. Bartlett, 2 M. & R. 362 (1841): Holdsworth v. Hunter, 10 B. & C. 449 (1830): Witte v. Williams, 8 S. Car. 290 (1876).

The Civil Code does not in terms recognize as a bill an instrument payable to the order of the drawee: see Art. 2282. Nor does the Code de Commerce: see Art. 110.

2. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note. Imp. Act, s. 5 (2). Option of holder in case specified.

§ 5. Where the drawer and the drawee are the same person notice of dishonor is dispensed with as regards the drawer: section 50, 2 (*c*).

Fictitious drawee. Where a bill is drawn upon a fictitious person or a person not having capacity to contract by bill, presentment for acceptance is excused: section 41, 2 (*a*); also presentment for payment: section 46, 2 (*b*). Notice of dishonor is, in such cases, dispensed with as regards the drawer: section 50, 2 (*c*)—and also as regards an indorser who was aware of the fact at the time he indorsed the bill: section 50, 2 (*d*).

For instance, a bill is drawn upon a fictitious person, or a minor, or a corporation having no power to incur liability on a bill, or a married woman having no separation of property from her husband in the Province of Quebec and not a trader or merchande publique. The holder may treat it as a note, and without presenting or protesting it, sue the drawer or such indorser.

ILLUSTRATIONS.

1. A bill is drawn upon a fictitious person and negotiated by the drawer. The holder may treat it as a note of the drawer and need not prove presentment or notice of dishonor: Smith v. Bellamy, 2 Stark. 223 (1817).

2. An instrument in the form of a bill, drawn upon a bank, by the manager of one of its branch banks, by order of the directors, may be treated as a note: Miller v. Thompson, 3 M. & G. 576 (1841).

3. The directors of a joint stock company draw a bill in the name of the company, addressed "To the Cashier." The holder may treat it as a note by the company: Allen v. Sea, F. & L. A. Co., 9 C. B. 574 (1850).

4. Although instruments where drawer and drawee are the same persons are promissory notes rather than bills, yet where the intention to give and receive them as bills of exchange is clear both the holders and the parties may treat them accordingly: Willans v. Ayers, 3 App. Cas. 133 (1877).

5. A bill drawn by a party upon himself is a bill of exchange in the hands of an indorsee: Randolph v. Parish, 9 Porter, 76 (1839).

6. Where the president of a company drew upon its treasurer for the amount due the payee as contractor, the holder may treat it as a draft of the company on itself or as a note of the company: Fairchild v. Ogdensburgh R. R. Co., 15 N. Y. 337 (1857); approved in Mobley v. Clark, 28 Barb. 391 (1858). See Taylor v. Newman, 77 Mo. 257 (1883). § 6.

6. The drawee must be named or otherwise indicated in a bill with reasonable certainty: Imp. Act, s. 6 (1). Drawee to be named

The name and address of the drawee, preceded by the word "To," are usually placed at the lower left-hand corner of a bill, but they may be placed on any part of it provided it be clear to whom the bill is meant to be addressed. The certainty is required in order that the payee may know upon whom he is to call to accept and pay the bill; and in order that the drawee may know whether he would be justified in accepting and paying the bill on account of the drawer. At common law the name of the drawee is not necessary, if he be otherwise sufficiently indicated. Blanks may be filled up in accordance with the provisions of section 20,—even after acceptance: section 18 (*a*). If the drawee be a fictitious person, see section 5, s-s. 2. If not addressed to a drawee, but accepted, is it a bill of exchange? See Peto v. Reynolds, 9 Ex. 410 (1854); 11 Ex. 418 (1855).

ILLUSTRATIONS.

1. Where the word "At" is placed before the name of the drawee instead of "To," it is sufficient: Shuttleworth v. Stephens, 1 Camp. 407 (1808).

2. Where the words "payable at No. 7 Wilmot Street, London," appeared on a bill in the place where the name of the drawee is usually written, and it was accepted by defendant, who lived there, held sufficient, and M. liable as acceptor: Gray v. Milner, 8 Taunt. 739 (1819).

3. A bill addressed "To the agent and owners" of a certain ship without naming them is a sufficient indication of the drawee: Taber v. Cannon, 8 Metc. 456 (1844).

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4. A bill addressed "To the Steamer Dorrance and owners" is a sufficient designation: Alabama Coal Mining Co. v. Brainard, 35 Ala. 476 (1860).

If there are more than one.

2. A bill may be addressed to two or more drawees, whether they are partners or not; but an order addressed to two drawees in the alternative, or to two or more drawees in succession, is not a bill of exchange. Imp. Act, s. 5 (2).

Where a bill is addressed to two or more drawees, it must be accepted by all or it is a qualified acceptance: section 19. 2 (*d*). But those who accept are bound even if the others do not.

A bill might formerly be addressed to two drawees in the alternative: Anon. 12 Mod. 447 (1701), where an instrument directed to A., or in his absence to B., and beginning. "Gentlemen, pray pay," etc., was held by Lord Holt to be a bill of exchange. If the bill is addressed to two persons "or either of them," acceptance by either is a sufficient compliance with its mandate. Thompson on Bills, 212. The referee in case of need sometimes named in a bill, as one to whom the holder may resort in case it is dishonored by the drawee, is not considered an alternative or successive drawee: section 15.

Certainty required as to payee.

7. Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty: Imp. Act, s. 7 (1).

In the definition of a bill the payee is spoken of as "a specified person": section 3. He should be clearly specified so that the drawee, when he accepts, may know to whom or to whose order he can safely pay. The payee need not be mentioned by name; it is sufficient that he be indicated so that he can be clearly identified. As to indication by office see notes to the following sub-section. Where the name of the payee is mis-spelt or where he is described by his office

or otherwise, parol evidence is admissible to identify him; but not to show who is meant where he is neither named nor described. Where the payee is wrongly designated or his name is mis-spelt, see section 32, s-s. 2. If the name of the payee be left in blank, the legal holder of the bill may fill up blank: Civil Code, Art. 2282; Cruchley v. Clarance, 2 M. & S. 90 (1813); Bagley v. Ellison, 16 V. L. R. 263 (1890).

§ 7.

Certainty of payee.

ILLUSTRATIONS.

1. An order to pay to the order of the trustees of an insolvent firm, without naming them, is sufficiently certain: Auldjo v. McDougall, 3 U. C. O. S. 199 (1833).

2. A note payable to the order of J. B. G., for the use of W. M., is a promissory note: Munro v. Cox, 30 U. C. Q. B. 363 (1870).

3. A note payable "to the estate of D." is valid: Dominion Bank v. Beacock, 9 C. L. T. 252 (1889); Lewinsohn v. Kent, 87 Hun (N. Y.) 340 (1895).

4. A note payable to —— or order cannot be recovered by the person to whom it was given either as payee or bearer, without inserting his name in the blank as payee: Mutual Safety Ins. Co. v. Porter, 7 N. B. (2 Allen) 230 (1851).

5. If no one be named or definitely referred to as payee, the instrument is not a valid bill: Gibson v. Minet, 1 H. Bl. 569 (1791); Enthoven v. Hoyle, 13 C. B. 373 (1853).

6. Where the bill was made payable to —— or order, evidence to show that C. was intended to be the payee was held to be inadmissible: Rex v. Randall, R. & R. 195 (1811).

7. Where a bill was made payable to the order of J. Smythe, evidence was admitted to show that T. Smith was the person intended: Willis v. Barrett, 2 Stark. 29 (1816). See Soares v. Glyn, 8 Q. B. 24 (1845); Jacobs v. Benson, 39 Me. 132 (1855).

8. An instrument which was made payable to "—— or order," the blank never having been filled in, must be construed as meaning that it was payable to "my order," that is, to the order of the drawer and having been indorsed by him, it was a valid bill of exchange: Chamberlain v. Young, [1893] 2 Q. B. 206.

9. A note payable "to the order of the indorser" was held to be valid, and payable to any holder who might indorse it: United States v. White, 2 Hill (N. Y.) 59 (1841).

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10. An instrument payable "to the estate of L., deceased," held not to be a note: Lyon v. Marshall, 11 Barb. (N. Y.) 241 (1851).

If payable to two or more payees, or to holder of office.

2. A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one or two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being: Imp. Act, s. 7 (2).

Chalmers says "this sub-section materially alters the law." From the illustrations given below it will be seen that the decisions on the subject have been conflicting both in the United States and in Canada, and also that they were not absolutely uniform in England. The second sentence would more naturally belong to the first sub-section, but in this the Imperial Act is followed.

ILLUSTRATIONS.

1. A promise to pay "to E. S. R. or J. F., his guardian," is not a promissory note: Reed v. Reed, 11 U. C. Q. B. 26 (1853).

2. A promise to pay "A. B., treasurer, etc., or his successor or successors in office," is a valid note: McGregor v. Daly, 5 U. C. C. P. 126 (1855).

3. A note payable to A., "or to his wife and no other person," is a good note and the same as if payable to A. alone: Moodie v. Rowatt, 14 U. C. Q. B. 273 (1856).

4. A promise to pay J. P., "treasurer of the building committee of St. John's Church, or his successor duly appointed," is a promissory note: Patton v. Melville, 21 U. C. Q. B. 263 (1861).

5. A note payable to A., "or his heirs," is not a promissory note: Doak v. Robinson, 12 N. B. (1 Han.) 279 (1868).

6. A promise to pay to "W. & D., stewardesses for the time being of the P. D. Society, or their successors in office," held to be a promissory note: Rex v. Box, 6 Taunt. 325 (1815).

7. A promise to pay "to A. or to B. or to C.," is not a note: Blanckenhagen v. Blundell, 2 B. & Ald. 417 (1819).

8. A promise to pay "to the trustees acting under the will of the late W.," held to be a promissory note: Megginson v. Harper, 2 C. & M. 822 (1834). § 7.

9. A promise to pay the secretary or treasurer for the time being of a society is not a note: Cowie v. Stirling, 6 E. & B. 333 (1856).

10. A promise to pay "to the W. M. P., or order, or the major part of them," is a good note: Watson v. Evans, 1 H. & C. 662 (1863).

11. A promise to pay "to the trustees of the Wesleyan Chapel, Harrogate, or their treasurer for the time being," is a good note: Holmes v. Jaques, L. R. 1 Q. B. 376 (1866). See Auldjo v. McDougall, 3 U. C. O. S. 199 (1833).

12. A note in the alternative is payable to, and may be sued on by, either one of the payees: Spaulding v. Evans, 2 McLean, 139 (1840).

13. A note payable to A. B., "or heirs," held to be a promissory note: Knight v. Jones, 21 Mich. 161 (1870).

14. A promise to pay a sum "to A. or B." is not a note: Carpenter v. Farnsworth, 106 Mass. 561 (1871).

15. A note payable to the order of "A. B., trustee for C. D.," is a good promissory note: Downer v. Read, 17 Minn. 493 (1871).

3. Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer. Imp. Act. s. 7 (3). If payee is non-existing.

Formerly in England it was only as against a party to the bill who knew that the payee was a fictitious person, that a bona fide holder could treat the bill as one payable to bearer: Chitty, p. 113; Minet v. Gibson, 3 T. R. 481 (1789).

Chalmers says, p. 21:—"This sub-section was inserted in committee in place of a clause working out in detail the effect of the cases. The words 'or non-existing' seem superfluous; but they were probably intended to cover the case of Aspitel v. Bryan, 3 B. & S. 474 (1864).

"Before the Act it appears that even the holder in due course could not enforce a bill which he held under the indorsement of a fictitious person, excepting as against parties who were privy to the fiction; the exception that bills drawn

§ 7.

Fictitious payee.

to the order of a fictitious or non-existing payee might be treated as payable to bearer was based uniformly upon the law of estoppel, and applied only against the parties who at the time they became liable on the bill were cognizant of the fictitious character or non-existence of the supposed payee: Vagliano v. Bank of England, (1889) 23 Q. B. D. 243, at p. 260, per Bowen, L.J., reviewing the cases: Story on Bills, §§ 56, 200.

"But the Act has swept away the former qualifications, and now any holder who could recover if the bill had been drawn payable to bearer can recover if the payee be fictitious. Where a bill is payable to the order of a fictitious person, it is obvious that a genuine indorsement can never be obtained, and in accordance with the language of the old cases and text-books the Act puts it on the footing of a bill payable to bearer. But inasmuch as a bill payable to one person, but in the hands of another, is patently irregular, it is clear that the bill should be indorsed, and perhaps a bona fide holder would be justified in indorsing it in the payee's name. It might have been better if the Act had provided that a bill payable to the order of a fictitious person might be treated as payable to the order of any one who should indorse it, or, in other words, as indorsable by the bearer. Though the bill may be payable to bearer, it is clear that a holder who is party or privy to any fraud acquires no title. What the Act has done is to declare that the mere fact that a bill is payable to a fictitious person is not of itself a bar to proceeding against parties who were ignorant of the fact."

Vagliano's Case.—The case of Vagliano and the Bank of England above mentioned is the most striking one that has arisen under the Imperial Act, and is of special interest not only on account of the number and magnitude of the forgeries in question, but also on account of the skilful manner in which they were perpetrated, and the great diversity of judicial opinion upon the questions of law involved. The following are the leading facts of the case. Vagliano, the plaintiff, was a London merchant, who kept his account with the

Bank of England and made his bills payable there. These each year numbered about 4,000 and amounted to three or four million pounds. Among his foreign correspondents was Vucina, an Odessa merchant, who for several years had drawn a large number of bills upon him, several of them being to the order of C. Petridi & Co., of Constantinople. During 1887, up to the 12th of October, Vucina's drafts upon him numbered over 700, aggregating about £340,000. Vagliano had a clerk named Glyka, who committed the forgeries in question. His plan was as follows:—He would forge Vucina's name to a draft in favor of C. Petridi & Co., place it among the genuine bills left for acceptance, forge a letter of advice from Vucina, procure Vagliano's acceptance, have it entered among the bills payable, and then steal the bill. The bank would be notified in due course, and Glyka would forge the indorsement of C. Petridi & Co., present the bill, and get the money. Between the 4th of February, 1887, and the 12th of October of that year when his forgeries were discovered, he had forged no less than 43 such bills, which aggregated £71,500. The bank charged these bills to Vagliano, and the action was brought by him to recover that amount.

The case was tried before Charles, J., without a jury. It was conceded that by section 54 of the Act, Vagliano was precluded from denying the genuineness of the signature of Vucina. The questions remained whether the case came within sub-section 3 of section 7, and what effect the conduct of the parties had upon their respective rights and liabilities. The decision was in favor of the plaintiff, the judge holding that C. Petridi & Co., the payees, were not "fictitious or non-existing persons" within the meaning of this sub-section, and the bank was not entitled to treat the bills in question as payable to bearer; that Vagliano had not been guilty of negligence immediately connected with the transactions, so as to disentitle him to recover; and that on the authority of Robarts v. Tucker, 16 Q. B. 560 (1851), embodied in section 24 of the Act, the bills being payable to order the bank had no right

§ 7. to pay to one who had not become the holder by genuine indorsement; 22 Q. B. D. 103 (1888).

In appeal. The case went to the Court of Appeal, where it was heard by six judges. The decision of Charles, J., was affirmed by the majority, Lord Esher, M.R., dissenting: 23 Q. B. D. 243 (1889). It was held that although the instruments in question might not really be bills of exchange at all, there being no real drawee and no real payee, the bank, in view of their acceptance by plaintiff and his letters directing their payment, was justified in dealing with them as if they were actual bills; that the payees were not fictitious or non-existing, but a real and existing firm; that "fictitious" meant fictitious to the knowledge of the party sought to be charged upon the bill; and that the bank was not justified in paying upon a forged indorsement. Lord Esher was of opinion that the instruments were not bills of exchange at all, but that Vagliano was estopped from saying that they were not bills; that the Bills of Exchange Act altered the law so that it was not necessary that Vagliano should know that the payees were fictitious in order to make the bills payable to bearer, and that in this case the payees were really fictitious and the bank consequently justified in paying the bills to the bearer.

Final judgment. In the House of Lords these decisions were reversed by the Lord Chancellor, Lords Selborne, Watson, Herschell, Macnaghten and Morris, while Lords Bramwell and Field were in favor of the plaintiff: [1891] A. C. 107. The majority however did not agree in the grounds upon which the judgment should be based. Lords Watson, Herschell, Macnaghten and Morris held that this sub-section applied, an opinion in which the Lord Chancellor reluctantly concurred, while Lord Selborne thought that the payees were not fictitious or non-existing. The Lord Chancellor and Lord Selborne thought that as Vagliano had accepted the bills, and had advised the bank that he had done so, and had seen the payments entered in his pass-book, he was estopped from claiming that the payments were unauthorized, an opinion

in which Lords Watson and Macnaghten alone partly concurred. The divergence of opinion was such that it would seem almost to justify the somewhat caustic remark of Lord Bramwell regarding the dissenting opinion of himself and of Lord Field, when he said: "It is some comfort to me to think that the head-note of our opinion may be expressed very shortly, and in the most abstract form—namely, a banker cannot charge his customer with the amount of a bill paid to a person who had no right of action against the customer, the acceptor. But I think the head-note which will represent the decision of your lordships should be in a strictly concrete form stating the facts and saying that on them it was held that judgment should be for the appellants."

An Australian case.

This clause as applicable to a promissory note was considered in the City Bank v. Rowan, 14 N. S. W. R. (Law) 126 (1893), a case under the New South Wales Act, which is identical with the English and Canadian Acts on this point. One W. Shackell, pretending to be acting for James Shackell & Co., of Melbourne, sold a lot of wool to defendant in Sydney, and on his handing over a bogus store warrant for the wool signed by one Jones, who claimed to be the Sydney agent of the Melbourne firm, received a promissory note payable to the order of James Shackell & Co. This was indorsed by Jones in the name of James Shackell & Co., and discounted with the City Bank. There had been a firm of James Shackell & Co. in the wool business in Melbourne; but it had been out of business for some time, although James Shackell still lived there. The Court held that the case was governed by Vagliano v. Bank of England, that James Shackell & Co., the payees, were non-existing, and even if they had been still an existing firm, they had no interest in the note, and no right to indorse it, or to be paid upon it, and that the payees were in reality fictitious. There being no person who had the right to indorse it as payee, it was in effect payable to bearer.

Fictitious payee of cheque.

The clause has also been considered by the House of Lords in another case arising out of cheques on a banker:

§ 7. Clutton v. Attenborough, [1897] A. C. 90. A clerk of plaintiffs, by fraudulently representing to them that work had been done for them by George Brett, induced them from time to time to draw cheques payable to the order of George Brett. There was no such person as George Brett and no such work had been done. The clerk forged Brett's indorsement, and negotiated the cheques with defendants, who gave value for them in good faith. They were duly paid by the banker. When plaintiffs discovered the fraud they sued defendants for money paid under a mistake of fact. It was claimed for plaintiffs that in case of a cheque the payee must be fictitious or non-existing to the knowledge of the drawer to bring it within the Act; but it was held that the case was governed by the Vagliano case, and that the payee was not the less a "fictitious or non-existing person" because the drawers supposed him to be a real person, and that the cheques were payable to bearer.

United States.—Under the Negotiable Instruments Law, § 28 (3), such an instrument is payable to bearer only "When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable." It will be observed that these latter words are a very important departure from the English and Canadian Acts. Nor do they agree with the former English law which is thus summarized by Lord Bowen in the Vagliano case, at p. 260 of 23 Q. B. D.: "Down therefore to the date of the passing of the recent statute the exception that bills drawn to the order of a fictitious or non-existing payee might be treated as payable to bearer was based uniformly on the law of estoppel, and applied only against the parties who at the time they became liable on the bill were cognizant of the fictitious character, or of the non-existence of the supposed payee."

Estoppels as to Payee.—The acceptor is precluded from denying to a holder in due course the existence of the payee and his capacity to indorse at the time of acceptance: section 54 (3). The drawer is also precluded from denying to a

holder in due course the existence of the payee and his capacity to indorse at the time the bill is drawn: section 55 (*b*). The onus is on the holder to prove that the payee is fictitious or non-existing. The holder of such a bill, if he desires to negotiate it, should indorse it in the name of the fictitious payee. The signature of the name of a fictitious payee in such a case must be distinguished from the forgery of the signature of a real person, and also from the case of a real payee using a business or fictitious name instead of his own. In France a bill with a fictitious payee is void in the hands of a holder with notice: Nouguier, § 277. In the United States it is looked upon with disfavor: Daniel, §§ 136-140.

By section 34, s-s. 3, the provisions of the Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.

ILLUSTRATIONS.

1. Where a note is made payable to a fictitious payee and not to his order or bearer, a holder for value cannot maintain an action against the maker as on a note payable to bearer, as it is not negotiable: Williams v. Noxon, 10 U. C. Q. B. 250 (1853).

2. A note in favor of one who is absent, and who (as it happens) is dead, is not void and his executors may maintain an action on it: Grant v. Wilson, 2 Rev. de Leg. 29 (1814).

3. When a bill was drawn in favor of a fictitious payee and indorsed by the drawer in that name to the knowledge of the acceptor, the latter is liable to an innocent indorsee for value: Gibson v. Minet, 1 H. Bl. 569 (1791).

4. The holder with notice of a bill payable to a fictitious payee cannot sue the acceptor: Hunter v. Jeffery, Peake, Ad. Ca. 146 (1797).

5. An agent having money in his hands, purchases with it a bill of exchange, which he indorses specially to his principal; the latter, at the time of the indorsement, was dead, but the fact was not known to the agent. Held, that the property in the bill passed to the administrator of the principal: Murray v. East India Co., 5 B. & Ald. 204 (1821).

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6. When a clerk drew and endorsed a bill as attorney for his deceased employer, upon a debtor of the estate who accepted with full knowledge of the facts, the acceptor was liable to the indorsee on the bill.: Aspitel v. Bryan, 3 B. & S. 474 (1864).

7. The innocent acceptor of a forged bill payable to a fictitious payee is liable to a bona fide holder for value, and the bill may be treated as if payable to bearer: Phillips v. im Thurn, L. R. 1 C. P. 463 (1866).

8. Where a promoter of a company induced a friend to subscribe for shares as C., a name not his own, and gave the directors the cheque of a third party to the order of C., which was not indorsed, the directors could treat the payee as fictitious, and indorse the cheque in the name of C.: Edinburgh Ballarat G. M. Q. Co. v. Sydney, 7 T. L. R. 656 (1891).

9. Where the name of the payee is fictitious it may be indorsed by the person to whom the note is delivered: Blodgett v. Jackson, 40 N. H. 21 (1859).

10. An instrument payable "to the estate of A.," a deceased person, is a promissory note, payable to a fictitious payee: Lewinsohn v. Kent, 87 Hun (N. Y.) 257 (1895).

11. When one procures a cheque by falsely pretending that he is another person (the maker knowing that there is such a person and making it payable to his order) and indorses it in the name of such other person, his indorsement conveys no title: Tolman v. American National Bank, 22 R. I. 462 (1901).

Certain bills valid but not negotiable

8. When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but it is not negotiable: Imp. Act, s. 8 (1).

If a party to a bill wishes to make it not negotiable, he must do so in clear terms. Where a bill was drawn payable to the order of F. the drawer, and the drawees struck out the word "order" and accepted the bill "in favor of F. only," at a certain bank, it was held that such acceptance was not a qualified one, and did not vary the effect of the bill as drawn: Meyer v. Decroix, [1891] A. C. 520. Where a cheque payable to the order of M. was crossed "account of M., National

Bank, Dublin," it was held that these words in the crossing did not prohibit transfer, and that the bank having credited M. with the amount, could sue the drawer: National Bank v. Silke, [1891] 1 Q. B. 435. For the rule as to bills negotiable in their origin, but which have their negotiability either stopped or limited by a restrictive indorsement, see section 35. The words "non-negotiable and given as security" written on the face of a note deprives it of its essential characteristic as a promissory note, and it becomes a mere contract of suretyship: Davis v. Robertson, Q. R. 6 Q. B. 261 (1897).

The Old Law.—Formerly a bill payable to a particular person and not to his order or to bearer would have come under this sub-section, and most of the non-negotiable bills and notes in the reported cases are of this class; now, by sub-section 4, such a bill is negotiable. It remains to be seen whether the Courts will recognize in third parties the same rights under a sale or assignment of a bill or note whose transfer is prohibited, as they have heretofore done as to a bill not payable to order or bearer. As to the law in England, Chalmers says at p. 131: "A bill may be transferred by assignment or sale, subject to the same conditions as would be requisite in the case of an ordinary chose in action. Thus:—C. is the holder of a note payable to his order. He may transfer his title to D. by a separate writing assigning the note to D.: Re Barrington, 2 Scho. & Lef. 112 (1804); or by a voluntary deed constituting a declaration of trust in favor of D.: Richardson v. Richardson, L. R. 3 Eq. 686 (1867), as explained in Warriner v. Rogers, L. R. 16 Eq. 340 (1873), or by a written contract of sale: Sheldon v. Parker, 3 Hun (N. Y.) 498 (1875). A bill is a chattel, therefore it may be sold as a chattel. A bill is a chose in action, therefore it may be assigned as a chose in action."

Chose in Action.—In Ontario, the Judicature Act, R. S. O. c. 51, s. 58, s-s. 5, provides for the transfer of a debt or chose in action by an assignment in writing, and gives the

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Chose in action.

assignee, after express notice of the assignment, the right to sue for or give a good discharge for the same without the concurrence of the assignor. R. S. Man. c. 40, s. 39, s-s. (e); R. S. B. C. c. 56, s. 16, s-s. 17; and Cons. Ord. N. W. T. c. 41, s. 1, contain similar provisions.

The law of Quebec is contained in Articles 1570 and 1571 of the Civil Code, and provides that the sale of debts and rights of action is effected by an instrument of sale, a copy of which is served on the debtor unless he is a party to it. The transferee may then sue in his own name. Article 1573 provides that these provisions do not apply to bills, notes or cheques payable to order or bearer. In McCorkill v. Barrabé, M. L. R. 1 S. C. 319 (1885), it was held that the indorsee of a non-negotiable note could sue the maker, when a copy of the note and indorsement had been served upon the latter.

In Brice v. Bannister, 3 Q. B. D. 569 (1878), Bramwell, L.J., in speaking of an assignment of money to be earned under a written contract, says at p. 580: "It does seem to me a strange thing and hard on a man that he should enter into a contract with another and then find that because that other has entered into some contract with a third, he, the first man, is unable to do that which is reasonable and just he should do for his own good. But the law seems to be so; and any one who enters into a contract with A. must do so with the understanding that B. may be the person with whom he will have to reckon. Whether this can be avoided, I know not; may be, if in the contract with A. it was expressly stipulated that an assignment to B. should give no rights to him such a stipulation would be binding. I hope it would be."

This section of the Act appears to furnish the stipulation suggested by Lord Bramwell, and as the law of Quebec makes provision for transfer the question proposed by him may come up for solution there. If there be a conflict between the Act and the Code there may be still further an important question as to which law shall override the other.

In Quebec it has been held that the indorsee of a non-negotiable note could sue his immediate indorser but not a

more remote party: Jones v. Whitty, 9 L. C. R. 191 (1859). See Bard v. Francoeur, Q. R. 7 S. C. 315 (1891). § 8.

In Harvey v. The Bank of Hamilton, 16 S. C. Can. 714 (1888), an Ontario case, it was held that although the note was not negotiable the indorsee was entitled to recover from the maker, it being shown that the note was intended by the makers to have been made negotiable, and was issued by them as such, but, by mistake or inadvertence, it was not expressed to be payable to the order of the payee. But, in this case might not the holder have added the words "or order" as having been omitted by inadvertence? In Kershaw v. Cox, 3 Esp. 246 (1800), it was held that the insertion of these words did not vitiate the note.

It has been held that the indorser of a non-negotiable note is not liable to the payee: West v. Brown, 3 U. C. Q. B. 290 (1846); and that the maker of a note payable to the treasurer of a township cannot be sued by the corporation: Township of Toronto v. McBride, 29 U. C. Q. B. 13 (1869).

The French Code de Commerce does not recognize a non-negotiable instrument as a bill of exchange: Arts. 110, 136.

2. A negotiable bill may be payable either to order or to bearer: Imp. Act, s. 8 (2). Payable to order or bearer.

3. A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank: Imp. Act, s. 8 (3). To bearer.

A bill is payable to bearer which is payable "to A. B. or bearer," or which is payable to "——— or bearer." The last clause of this sub-section altered the law in England, and it also alters the law in Canada. Formerly a bill having been indorsed in blank, its negotiability could not afterwards be restrained by a special indorsement: Walker v. Macdonald, 2 Ex. 527 (1848). No indorsement other than that by a payee can stop the negotiability of the bill: Civil Code, Quebec, Art. 2288. A cheque payable to C. M. & S. or bearer was

§ 8. stamped for deposit to their credit in a bank and indorsed by them. Their clerk instead of depositing it drew the funds, the teller not observing the special indorsement. It was held that as bearer the clerk was entitled to receive payment and the bank which paid was not liable: Exchange Bank v. Quebec Bank, M. L. R. 6 S. C. 10 (1890).

As to a bill not payable to bearer, negotiable in its origin, being made non-negotiable by a restrictive indorsement, see section 36.

To order.

4. A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable: Imp. Act, s. 8 (4).

The second part of this sub-section makes an important change in the law. See Ward v. Quebec Bank, Q. R. 3 Q. B. 122 (1894). Formerly in Canada a bill or note payable to a particular person by name and not to his order or to bearer was not negotiable: Harvey v. Bank of Hamilton, 16 S.C. Can. 714 (1888). Jones v. Whitty, 9 L. C. R. 191 (1859); Banque du Peuple v. Ethier, 1 R. L. 47 (1869); McCorkill v. Barrabe, M. L. R. 1 S. C. 319 (1885); Mallette v. Sutcliffe, Q. R. 5 S. C. 430 (1894); West v. Bown, 3 U. C. Q. B. 290 (1846).

Such a note was not a negotiable instrument in England before the Act of 1882, which adopted the law of Scotland in this respect for the United Kingdom: Plimley v. Westley, 2 Bing. N. C. 251 (1835). Such is still the law in nearly all the United States, including those States which have adopted the Negotiable Instruments Law: Daniel, § 105; Randolph, § 174; Neg. Inst. Law, §§ 20, 27.

Not retrospective.

Like other changes in the law introduced by the Act, it applies only to bills and notes made in Canada on or after the 1st of September, 1890. As to the assignment or transfer of

non-negotiable bills, or what is a sufficient indication of an intention that a bill should not be transferable, see the notes to sub-section 1 of this section. § 9.

Under the old law if a bill originally negotiable were indorsed to a particular person and not to his order, it would still be negotiable by him: Moore v. Manning, Comyns, 311 (1719).

5. Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order, at his option. Imp. Act, s. 8 (5). Option of payee.

A bill payable to a person "or his order" or "to the order" of a person means the same thing, and in either case he can demand payment without indorsing it: Myers v. Wilkins, 6 U. C. Q. B. 421 (1849). A note payable "to A. or order on account of B." is payable to A. or to his order and not to B.: Newton v. Allen and Moir v. Allen, 2 Rev. de Leg. 29 (1817); Clark v. Esson, 2 Rev. de Leg. 30 (1820).

9. The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid— Sum payable.

(*a*) With interest;

(*b*) By stated instalments;

(*c*) By stated instalments, with a provision that upon default of payment of any instalment the whole shall become due;

(*d*) According to an indicated rate of exchange, or according to a rate of exchange to be ascertained as directed by the bill: Imp. Act, s. 9 (1)

A bill must be for "a sum certain in money"; section 3. See notes and illustrations ante p. 39. This section gives

§ 9. some instances that might not be thought to come under that designation unless specially so declared.

"**With Interest.**"—It may be "with interest" simply, or with interest at a certain rate. In the former case the rate up to maturity at least would be determined by the law of the place where the bill is drawn: Story on Conflict of Laws, 8th ed., s. 305: Allen v. Kemble, 6 Moore P. C. at p 321 (1848). In Canada where no special rate is mentioned, the law formerly fixed it at 6 per cent.; since the 7th of July, 1900, the rate has been 5 per cent.: but the parties may agree upon any higher or lower rate: R. S. C. c. 127, ss. 1 and 2, as amended by 63-64 V. c. 29, s. 1. Formerly there were restrictions in certain cases in most of the provinces. In Ontario and Quebec certain corporations could not take more than six, and others not more than eight per cent.: R. S. C. c. 127, s. 10. See as to Nova Scotia ss. 12 to 17; New Brunswick, ss. 18 to 23; British Columbia, ss. 24 to 27; Prince Edward Island, ss. 28 to 30. The restrictions relating to these provinces were all abolished by the Act of 1890 immediately following the present Act, 53 Vict. c. 34, which repeals sections 9 to 30 inclusive of R. S. C. c. 127. Banks are subject to the following limitation: "The bank shall be liable to incur any penalty or forfeiture for usury, and may stipulate for, take, reserve or exact any rate of interest or discount not exceeding seven per centum per annum, and may receive and take in advance any such rate, but no higher rate of interest shall be recoverable by the bank": Bank Act, 53 Vict. c. 31, s. 80. Section 81 provides that no promissory note or bill of exchange discounted by or assigned to a bank shall be void on the ground of usury, on account of its bearing a higher rate of interest than is allowed in the province, but the bank shall not be entitled to recover more than seven per cent. On account of the repeal of the usury clauses of "The Act respecting Interest" affecting the different provinces, as mentioned above, the greater part of the latter section is now inoperative. Certain corporations by their charters are re-

stricted as to the rate of interest they may take. These are not affected by the above repeal. § 9.

In England the rate is 5 per cent., but the parties may agree upon any other rate: Upton v. Ferrers, 5 Ves. 803 (1801). In the United States the rate varies. In most of the northern and north-eastern States the legal rate is 6 per cent.; in Wisconsin, Minnesota, and some other western States it is 7 per cent. In Massachusetts, Rhode Island, and Connecticut, usury laws have been abolished; in the other northern and north-eastern States they still exist with varying degrees of severity. In New York any higher rate than 6 per cent. is only allowed in exceptional cases. In Ohio, Indiana and Illinois the maximum is 8 per cent.; in Michigan, Wisconsin and Minnesota, 10 per cent. Interest.

Where a bill drawn in one country is negotiated, accepted or payable in another, for the rule as to what rate of interest is to govern, see the notes under section 71.

Where a special rate of interest is mentioned in the bill, see the notes and cases under section 57, s-s. 2, as to the rate which is to run after maturity.

"By Stated Instalments."—The instalments must be "stated," for if there be any uncertainty about them the instrument is not a bill. The instalments may be either with or without interest. As to presentment and notice of dishonor each instalment is treated as a separate bill. A valid indorsement must be of all instalments unpaid.

ILLUSTRATIONS.

1. A promise to pay £102 "in yearly proportions," held to be a valid note payable in two annual instalments: McQueen v. McQueen, 9 U. C. Q. B. 536 (1852).

2. A note was made payable in eighteen months, with interest at 7 per cent. payable half-yearly. In order to bind the indorser for any instalment of interest the note should have been presented when the instalment was payable, and notice given him of dishonor: Jennings v. Napanee Brush Co., 4 C. L. T. 595 (1884).

3. An action lies on a note payable by instalments as soon as the first day of payment is passed, but only for the amount of the

§ 9. first instalment, each of them being considered as a separate debt: Clearihue v. Morris, 2 Rev. de Leg. 30 (1820).

4. A bill was payable in three equal instalments. When the first became due, it was presented at the bank where it was made payable, the cashier paid the instalment due, and returned the bill to the holder with the following indorsement: "Paid on the within $741, Aug. 12, '61." Held, to be an acceptance for the remaining instalments: Berton v. Central Bank, 10 N. B. (5 All.) 493 (1863).

5. A promise to pay £50 by instalments, all payments to cease on the death of W., is not a note: Worley v. Harrison, 3 A. & E. 669 (1835).

6. A promise to pay £6 "by instalments" simply, is not a note: Moffat v. Edwards, Car. & M. 16 (1841).

7. A note payable by instalments, with a proviso that if default is made on the first instalment the whole shall become due, is a valid note, and on default an indorser is liable for the whole amount: Carlon v. Kenealy, 12 M. & W. 139 (1843).

8. A non-negotiable note, payable in instalments, but on default the whole to become due, is valid, and the maker has three days' grace: Miller v. Biddle, 11 Jur. N. S. 980; 13 L. T. N. S. 334 (1865).

9. A promise 'to pay £250 on demand together with any interest that may accrue thereon," is not a promissory note, as the rate of interest and the time for which it is to run are both uncertain: Lamberton v. Aiken, 2 Rettie (5th series) 189 (1899).

10. A note payable "in such instalments, and at such times as the directors of a company may from time to time require," held to be a valid note, as being payable on demand, or in instalments on demand: White v. Smith, 77 Ill. 35 (1875).

"**With Exchange.**"—Where the bill is to be paid in one country and the sum is expressed in the currency of another, the amount is determined according to the rate of exchange on the day the bill is payable: Hirschfield v. Smith, L. R. 1 C. P. p. 340 (1866); section 71, 2 (*d*). On a sterling bill drawn in London on defendant in Toronto, but accepted by him in London and payable there, plaintiff was held entitled to be paid at the current rate of exchange: Greatorex v. Score, 6 U. C. L. J. 212 (1860). It was formerly held in Ontario

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that a promise to pay a certain sum "with exchange on New York," or "with the current rate of exchange on New York," or "with exchange not to exceed one-half per cent.," was not valid as not being for a sum certain: Palmer v. Fahnestock, 9 U. C. C. P. 172 (1859); Fahnestock v. Palmer, 20 U. C. Q. B. 307 (1860); Grant v. Young, 23 ibid, 387 (1864); Wood v. Young, 14 U. C. C. P. 250 (1864); Saxton v. Stevenson, 23 ibid. 503 (1874). It was also held in New Brunswick that a promise to pay £42 3s. 9d. with current rate of exchange on Boston was not a promissory note: Nash v. Gibbon, 9 N. B. (4 Allen) 479 (1860). It was also held in a number of cases in Ontario that notes payable in current funds of the United States were not valid, but these cases were expressly overruled in Third National Bank of Chicago v. Cosby, 43 U. C. Q. B. 58 (1878).

Discrepancy between figures and words.

2. Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable: Imp. Act, s. 9 (2).

Usually the amount is stated in words in the body of the bill, and in figures in the margin. In some countries the law requires the amount to be stated in words, while in others both are required: Randolph, § 105. The figures in the margin form no part of the bill or note: Garrard v. Lewis, 10 Q. B. D. 30 (1882). When the words are not distinct, or the word "dollars" or "pounds" is omitted, the figures in the margin may be looked at to explain them: Rex v. Elliott, 1 Leach C. C. 175 (1777); Phipps v. Tanner, 5 C. & P. 488 (1833); Beardsley v. Hill, 61 Ill. 354 (1871).

The rule in this sub-section is so binding that when the figures in the margin differ from the amount in words evidence is inadmissible to show that the amount in figures is the correct one: Saunderson v. Piper, 5 Bing. N. C. 425 (1839).

§ 10.

Interest.

3. Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated, from the issue thereof. Imp. Act, s. 9 (3).

The first part of this sub-section follows the old law. On a note payable on demand with interest, the interest runs from the date of the note: Baxter v. Robinson, 2 Rev. de Leg. 439 (1816); Dechantal v. Pominville, 6 L. C. J. 88 (1860); Crouse v. Park, 3 U. C. Q. B. 458 (1847); Howland v. Jennings, 11 U. C. C. P. 272 (1861). Where a note was made payable twelve months after date, with six months' interest, the interest began to run six months after the date of the note: Heaviside v. Munn, 2 Rev. de Leg. 439 (1817). The agreement between the parties fixes the rate, no matter how exorbitant it may be: Young v. Fluke, 15 U. C. C. P. 360 (1865).

As to what rate of interest should be allowed after maturity, see notes to section 57, s-s. 2.

An undated bill is issued when first delivered, complete in form, to a person who takes it as a holder: section 2 (*i*). A bill is complete in this sense without being dated: section 3, 4 (*a*). If a wrong date is inserted and the bill comes into the hands of a holder in due course, he can collect interest from the date inserted, even if it be previous to the true date of issue: sections 12 and 20.

Bills payable on demand.

10. A bill is payable on demand—

(*a*) Which is expressed to be payable on demand, or on presentation; or—

(*b*) In which no time for payment is expressed: Imp. Act, s. 10 (1).

Clause (*a*) differs from the Imperial Act which has the words "or at sight" after "demand." If this section stood alone it might be inferred that bills payable "at sight" were

meant to be included as being payable "on presentation," and therefore not entitled to three days of grace under section 14. But sub-sections 3 and 4 of section 14 and section 39 show that bills payable at sight were not meant to be included among those payable on demand. § 10.

By section 3 every bill is payable either on demand or at a determinable future time. The Imperial Act enumerates in section 10 the five classes of bills which are payable on demand within the meaning of that Act, viz.:

(1) Those expressed to be payable on demand;

(2) Or at sight;

(3) Or on presentation;

(4) Those with no date expressed; and

(5) Those accepted or indorsed after maturity.

In section 11 it enumerates the four classes of those payable at a determinable future time, viz.: At a future time.

(1) Those payable at a fixed period after date;

(2) Or after sight;

(3) On the occurrence of a specified event certain to happen; and

(4) At a fixed period after the happening of such event.

Those in section 11 are entitled to days of grace, those in section 10 are not. For a long time it was a doubtful point in England whether bills payable at sight or on presentation were entitled to days of grace. It was finally settled by the Courts that they were. But by 34 & 35 Vict. c. 74, after stating the doubts that had arisen on the subject, it was enacted that bills and notes payable at sight or on presentation should be payable on demand and have no days of grace. This provision was reproduced in the Imperial Bills of Exchange Act. Days of grace.

In Canada, before the Act, bills payable at sight were entitled to days of grace. The bill as introduced into Parliament proposed to assimilate our law to that of England in this respect. The House of Commons, however, decided not to make the change, and the words "or at sight" were struck

§ 10.

Days of grace.

out of the clause (*a*): Commons Debates, 1890, p. 108. Apparently, however, by an oversight they were not then inserted in section 11; so that the enumeration in these two sections, which was meant to be exhaustive and to include all bills that meet the conditions of section 3, did not, in the Act as passed in 1890, include bills payable at sight under either head. This has been remedied by the Act of 1891, which has included them among those payable at a determinable future time, and so entitled to grace.

The term "on presentation" has not been in common use in Canada. "On demand" has been the ordinary expression used when the bill was to be paid on presentation, and "at sight" when it was to be paid three days later. These particular words, however, need not be used; any other words that convey the same idea would serve equally well. "Presentation" is used in section 93, s.-s. 5, as synonymous with "presentment."

In the United States as a rule days of grace were formerly allowed on bills payable at sight: 1 Daniel, § 617. In those states which have adopted the Negotiable Instruments Law there are no days of grace on any bill or note: § 145. In France a bill payable at sight is payable on presentation: Code de Com. Art. 130.

Acceptance when overdue.

2. Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand: Imp. Act, s. 10 (2).

"Before this enactment the English law on the subject dealt with was very obscure; but it had been held in the United States that where a bill was indorsed after maturity, the indorser was entitled to have it presented for payment and to receive notice of dishonor in the event of non-payment, within a reasonable time": Chalmers, p. 30. In Upper Canada the same principle had been laid down in Davis v

Dunn, 6 U. C. Q. B. 327 (1850). As to the United States, see Patterson v. Todd, 18 Penn. St. 426 (1852); Goodwin v. Davenport, 47 Me. 112 (1860); Light v. Kingsbury, 50 Mo. 331 (1872); Eisenlord v. Dillenback, 15 Hun (N. Y.) 23 (1878); Bull v. First Nat. Bank, 14 Fed. Rep. 613 (1883); Bassenhorst v. Wilby, 45 Ohio St. 336 (1887); German-American Nat. Bank v. Atwater, 165 N. Y. 36 (1900): also Daniel, § 611, and Randolph, § 596 and 671 and cases there cited. § 11.

11. A bill is payable at a determinable future time, within the meaning of this Act, which is expressed to be payable— Bill payable at a future time.

(*a*) At sight, or at a fixed period after date or sight:

(*b*) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening is uncertain: Imp. Act, s. 11 (1) and (2); 54-55 Vict. c. 17, s. 1 (Can.)

(*a*) This clause in the Act of 1890 was copied from the Imperial Act without change and read, "At a fixed period after date or sight." As mentioned in the notes under section 10, sight bills in England are payable on demand. The Canadian Parliament refused to abolish the days of grace on these bills, and they were struck out of section 10, but were not then inserted in this section, so that they did not appear in either list. The first section of the amending Act of 1891 placed them in the first clause of the present section.

As to when bills payable at a determinable future time fall due, see section 14. In the case of acceptance for honor, see section 64, s-s. 5.

It is not necessary to use either the word "date" or "sight" to bring a bill within the provisions of clause (*a*) of this section.

§ 11. The following are examples of bills and notes that have been held to be valid as coming within the rule laid down in this sub-section:—

1. An instrument payable 17 months after date without interest or 41 months after date with interest, as falling due at the later date: Hogg v. Marsh, 5 U. C. Q. B. 319 (1849).

2. A promise to pay on a specified date, with a proviso that if the maker should sooner sell certain lands, the note should be payable on demand: Elliott v. Beech, 3 Man. 213 (1886). A note payable on a day named with the addition that if the payees considered the note insecure they have power to declare it due and payable at any time: Massey Mfg. Co. v. Perrin, 8 Man. 457 (1892). A promise to pay 12 months after notice: Clayton v. Gosling, 5 B. & C. 360 (1826); or on six months' notice: Walker v. Roberts, Car. & M. 590 (1842); or two months after demand in writing: Price v. Taylor, 5 H. & N. 540 (1860); or upon notification of 30 days in any newspaper. Protection Ins. Co. v. Bill, 31 Conn. 534 (1863).

"**Certain to Happen.**"—Most of the instances of valid notes under this head are those payable at or after the death of some person.

The following are illustrations:—

1. "Six weeks after the death of my father": Cooke v. Colehan, 3 Str. 1217 (1745); "one year after my death": Roffey v. Greenwell, 10 A. & E. 222 (1839); "on demand after my decease" Bristol v. Warner, 19 Conn. 7 (1848).

2. It was held in Andrews v. Franklin, 1 Str. 24 (1717), that a note payable two months after a Government ship was paid off, was a good note as Government was certain to pay; but this decision is open to question.

3. A promise to pay when an infant comes of age, naming the day, is a good note: Goss v. Nelson, 1 Burr. 226 (1757); also a promise to pay on a day named, or when a certain work is completed, the day named being held to be the day when it fell due: Stevens v. Blount, 7 Mass. 240 (1810); "on or by" a certain day: Massie v. Belford, 68 Ill. 290 (1873); Preston v. Dunham, 52 Ala.

217 (1875); on or before a certain time: Bates v. Leclair, 49 Vt. 229 (1877); Helmer v. Krolick, 36 Mich. 371 (1877). § 11.

2. An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect. Imp. Act, s. 11. As to contingencies.

ILLUSTRATIONS.

Orders or promises to pay a certain sum of money on the following terms and conditions have been held not to be valid bills or notes, under the rule laid down in this sub-section:—

1. At the sale of timber marked P. A., in Quebec: Russell v. Wells, 5 U. C. O. S. 725 (1848).

2. One month after a house is finished: Garner v. Hayes, 10 A. R. 24 (1884).

3. On completion of contract on building now in course of erection: Thomson v. Higgins, 23 A. R. 191 (1896).

4. On the arrival of a certain ship: Wood v. Higginbotham, 2 Rev. de Leg. 28 (1813); Palmer v. Pratt, 2 Bing. 185 (1824); Coolidge v. Ruggles, 15 Mass. 386 (1819).

5. Three days after the sailing of a vessel: Dooly v. Ryarson, 1 Q. L. R. 219 (1878); Duchaine v. Maguire, 8 Q. L. R. 295 (1882).

6. Within so many days after the maker married: Pearson v. Garrett, 4 Mod. 242 (1693); Beardsley v. Baldwin, 2 Str. 1151 (1741).

7. £116 on the death of G. H., provided he left the makers so much, or if they were otherwise able to pay it: Roberts v. Peake, 1 Burr. 323 (1757).

8. Ninety days after sight, or when realized: Carlos v. Fancourt, 5 T. R. at p. 486 (1794).

9. When I am in good circumstances: Ex parte Tootell, 4 Ves. 372 (1798).

10. When a certain sale is made: Hill v. Halford, 2 B. & P. 413 (1801); De Forest v. Frary, 6 Cow. 151 (1826).

11. Ninety days after sight or when realized: Alexander v. Thomas, 16 Q. B. 333 (1851).

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12. **Should another note not be met at maturity:** Dickinson v. Bower, 14 T. L. R. 146 (1897).

13. **When in funds:** Gillespie v. Mather, 10 Penn. St. 28 (1848).

14. **When an estate is settled up:** Husband v. Epling, 81 Ill. 172 (1876).

15. **On demand, or in three years:** Maloney v. Fitzpatrick, 133 Mass. 151 (1881).

Omission of date in bill payable after date.

12. Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at sight or at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly;

As to wrong date.

Provided that (*a*) where the holder in good faith and by mistake inserts a wrong date, and (*b*) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course, the bill shall not be voided thereby, but shall operate and be payable as if the date so inserted had been the true date. Imp. Act, s. 12; 54-55 Vic. c. 17, s. 2 (Can.)

In the Act as passed in 1890 the third line read, "payable at a fixed period after sight," thus following the Imperial Act. It was another case of an omission to harmonize the rest of the Act with the change made in section 10 by the exclusion of sight bills from those payable on demand. Sight bills thus requiring acceptance a rule became necessary for an undated acceptance. The words "at sight or" were therefore inserted after "payable" by section 2 of the Act of 1891.

A bill of exchange without a date is valid: De la Courtier v. Bellamy, 2 Show. 422 (1685); Hague v. French, 3 B. & P. 173 (1802); Pasmore v. North, 13 East 521 (1811); Giles v. Bourne, 6 M. & S. 73 (1817); Cowing v. Altman, 71 N. Y. 441 (1877). A date is not included among the conditions in

section 3; but it is a material part of a note and should not be altered: section 63, s.-s. 2. A bill is issued when it is first delivered complete in form, to a person who takes it as holder: section 2 (i). It is only when payable at a fixed period after date, or at sight, or at a fixed period after sight, that the date of the bill or of the acceptance becomes of importance. Where an acceptance is not dated, the bill is presumed to have been accepted a few days after its date: Roberts v. Bethell, 12 C. B. 778 (1852). In France if a bill be payable after sight, and the acceptance be not dated, time runs from the date of the bill: Code de Com. Art. 122. § 13.

The section probably goes farther than the old law. It has been held that parol evidence was admissible to show from what time an undated instrument was intended to operate: Davis v. Jones, 17 C. B. 625 (1856); Richardson v. Ellett, 10 Tex. 190 (1853); Cowing v. Altman, 71 N. Y. 435 (1877); and that when a note without date was made for another's accommodation, the maker authorized him to fill up the date as he saw fit: Androscoggin Bank v. Kimball, 10 Cush. 373 (1852). And where the maker in June, 1875, sent an accommodation note dated "6th, 1875," not naming a month and the 6th of June was a Sunday, and the receiver made the date "June 8th," the note was held not to be voided: Merchants' Bank v. Stirling, 13 N. S. (1 R. & G.) 439 (1880).

This [illegible] of authorization is now extended as regards th[illegible] named to any payee or indorsee who has the bill in possession, and to the bearer. As to filling up omissions in incomplete bills generally, see section 20.

In France, under the Code de Commerce, Art. 110, a bill must be dated. Under the old French law, according to Pothier, Contrat de Change, No. 36, "omission of the date, or error in the date, cannot be raised by the drawer or the acceptor."

13. Where a bill or an acceptance, or any indorsement on a bill, is dated, the date shall, unless Date prima facie evidence.

§ 13. the contrary is proved, be deemed to be the true date of the drawing, acceptance or indorsement, as the case may be: Imp. Act, s. 13 (1).

Date.

"It may be laid down as a general prima facie presumption, that all documents were made on the day they bear date": 1 Taylor on Evidence, § 169. This has been specially recognized with reference to bills and notes: Hays v. David, 3 L. C. R. 112 (1852); Evans v. Cross, 15 L. C. R. 86 (1865); Hutchins v. Cohen, 14 L. C. J. 85 (1869); Smith v. Battens, 1 M. & Rob. 341 (1834); Anderson v. Weston, 6 Bing. N. C. 296 (1840); Roberts v. Bethell, 12 C. B. 778 (1852).

Parol evidence is admissible to show that the date on the bill is not the true date and to show the true date: Pasmore v. North, 13 East 517 (1811); Montague v. Perkins, 17 Jur. 557 (1853); Macdonald v. Whitfield, 8 App. Cas. 733 (1883); Bayley v. Taber, 5 Mass. 286 (1809); Drake v. Rogers, 32 Me. 524 (1851); Germania Bank v. Distler, 1 Hun 633 (1875); Biggs v. Piper, 86 Tenn. 589 (1888); Higgins v. Ridgway, 153 N. Y. 130 (1898); Witherow v. Slayback, 158 N. Y. 699 (1899).

If an indorsement is not dated, the true date of the indorsement and delivery may be proved: Inkiel v. Laforest, Q. R. 7 Q. B. 456 (1897).

If a bill be dated on an impossible date, such as the 31st of September, the law adopts the nearest day by the doctrine of cy pres; and the computation will be from the 30th of September: Wagner v. Kenner, 2 Robinson (La.) 120 (1842).

Certain datings not to invalidate.

2. A bill is not invalid by reason only that it is antedated or postdated, or that it bears date on a Sunday or other non-juridical day. Imp. Act, s. 13 (2).

Bills, cheques, and notes are sometimes postdated or antedated for purposes of convenience; and the fact that they are negotiated prior to the day of date, is not a suspicious circumstance against which parties must guard: Daniel, § 85. The indorsee of a bill that was postdated, and indorsed by the payee who died before the day of date, was held to have derived title through the indorser and entitled to recover against the drawer: Pasmore v. North, 13 East, 517 (1811). This case has been followed in the United States: Brewster v. McCardel, 8 Wend. 479 (1832). Time is computed on such bills with reference to the actual date they bear. A postdated cheque is equivalent to a bill payable after date: Forster v. Mackreth, L. R. 2 Ex. 163 (1867); Royal Bank v. Tottenham, [1894] 2 Q. B. 715. § 13.

The above rule as to a bill dated on Sunday, is that of the Imperial Act and also of the English law before the Act. But if a bill were given in pursuance of a contract declared by 29 Car. 2, c. 7, to be illegal, as being made on a Sunday in the course of a man's ordinary calling, it would be void as between the immediate parties, and as to any person who takes it with notice: Begbie v. Levi, 1 C. & J. 180 (1830). The fact of its being dated on Sunday would not be such notice. The above Act of Charles II. is in force in some of the provinces, and in several of the provinces similar Acts have been passed. See R. S. O. c. 246; R. S. Q. Art. 3498; R. S. N. B. Tit. 39, c. 134, s. 2; 20 Geo. III. (P. E. I.) c. 3. The words "or other non-juridical day," are not in the Imperial Act, and were not in the bill, but were added in the Senate to remove possible doubts: Senate Debates, 1890, p. 463. Bill dated on Sunday

A note void as between the immediate parties on account of its being a Sunday transaction, would be valid in the hands of a holder in due course.

ILLUSTRATIONS.

1. A note made on Sunday in payment of goods sold on that day is void as between the original parties, but not as against an indorsee for value and without notice: Houliston v. Parsons, 9 U. C. Q. B. 681 (1852); Crombie v. Overholtzer, 11 U. C. Q. B. 55 (1853).

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2. A promissory note dated on Sunday given in payment of a horse purchased on that day, is null and void: Coté v. Lemieux, 9 L. C. R. 221 (1859).

3. A promissory note made on Sunday is valid: Kearney v. Kinch, 7 L. C. J. 31 (1863).

4. An indorsee may recover against the acceptor of a bill dated on Sunday: Begbie v. Levi, 1 Cr. & J. 180 (1830).

5. A bill made and delivered on Sunday is void in most of the United States: Randolph, §§ 225, 1790.

Computation of time of payment.

14. Where a bill is not payable on demand, the day on which it falls due is determined as follows:—

Days of grace.

(*a*) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace: Provided that—

Non-juridical days.

(1) Whenever the last day of grace falls on a legal holiday or non-juridical day in the Province where any such bill is payable, then the day next following, not being a legal holiday or non-juridical day in such Province, shall be the last day of grace: Imp. Act, s. 14 (1); R. S. C. c. 123, s. 2; C. C. 2306.

Days of grace.

The first part of this sub-section is taken verbatim from the Imperial Act; its effect, however, is different. There bills payable at sight are payable on demand by section 10, so that they are not entitled to days of grace. In Canada they fall under the rule in clause (*a*). The proviso is taken from R. S. C. c. 123, s. 2, and differs materially from the corresponding rule in England. There when the last day of grace falls on Sunday, Christmas Day, Good Friday, or a public fast or thanksgiving day, it is payable on the preceding business day, except that when the last day of grace is a bank

holiday other than Christmas or Good Friday, or when the last day of grace is a Sunday, and the second day of grace is a bank holiday, the bill is payable on the succeeding business day. § 14.

This sub-section applies only to bills payable in Canada. Those payable elsewhere are governed as to their due date by the law of the place where they are payable: section 71 (2) (*c*).

In the United States, as a general rule, if a bill payable without grace falls due on a Sunday or legal holiday it is not payable until the next regular business day; but if payable with grace and the last day of grace falls on a Sunday or holiday, it is payable on the day preceding: 1 Daniel, § 627. In France a note maturing on a holiday is payable the day before: Code de Com. Art. 134.

2. In all matters relating to bills of exchange the following and no other shall be observed as legal holidays or non-juridical days, that is to say:

What shall be holidays.

(*a*) In all the Provinces of Canada, except the Province of Quebec—

In all Provinces except Quebec.

Sundays;

New Year's Day;

Good Friday;

Easter Monday;

Victoria Day (May 24th);

Christmas Day;

The birthday (or the day fixed by proclamation for the celebration of the birthday) of the reigning Sovereign; and if such birthday is a Sunday, then the following day;

The first day of July (Dominion Day), and if that day is a Sunday, then the second day of July as the same holiday;

§ 14. The first Monday in September, to be designated "Labour Day": 57-58 Vict. c. 55, s. 2;

Any day appointed by proclamation for a public holiday, or for a general fast, or a general thanksgiving throughout Canada; and the day next following New Year's Day, Victoria Day and Christmas Day, when those days respectively fall on Sunday;

In Quebec. (*b*) And in the Province of Quebec the said days, and also—

The Epiphany; (Jan. 6th.)

The Ascension; (Movable.)

All Saints' Day; (Nov. 1st.)

Conception Day; (Dec. 8th.)

In every Province. (*c*) And also, in any one of the Provinces of Canada, any day appointed by proclamation of the Lieutenant-Governor of such Province for a public holiday, or for a fast or thanksgiving within the same, or being a non-juridical day by virtue of a statute of such Province: R. S. C. c. 123, s. 3.

"Province" includes the North-West Territories and the district of Keewatin; and "Lieutenant-Governor" includes administrator: R. S. C. c. 1, s. 7 (9) and (13).

The original Act increased the number of holidays in two particulars:—1st, in making Monday a holiday when the Queen's birthday falls on Sunday; and 2nd, in making every provincial non-juridical day a holiday in that province. The Annunciation, March 25th, Corpus Christi, a movable festival, and St Peter's and St. Paul's Day, June 24th, were holidays for Quebec under the Act of 1890; but were struck out of the list in 1893, by 56 V. c. 30. Labour Day was added in 1895, and Victoria Day in 1901, both for the whole Dominion.

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The holidays on bills and notes in England are Sundays, Christmas Day, Good Friday, and any public fast or thanksgiving day, and the bank holidays—Easter Monday, Whit Monday, and the first Monday in August.

In most of the United States the holidays on bills and notes besides Sundays are New Year's Day: Washington's Birthday, Feb. 22nd; July 4th; Thanksgiving Day, and Christmas Day; also in most of the Northern States, Declaration or Memorial Day, May 30th, and in many of the States, election day. As a rule when any of these days is a Sunday, Monday is observed as a holiday.

3. Where a bill is payable at sight, or at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment: Imp. Act, s. 14 (2.)

Days to be computed when time begins to run.

The method of computing time on a bill is that of the old law: Campbell v. French, 6 T. R. 200 (1795); also of the English Judicature Act, Order lxiv., Rule 12; of the Ontario Judicature Act, Rule 344, and of the Quebec Civil Code in matters of prescription, Art. 2240; but not the law of procedure in Quebec, where both terminal days are excluded: Code of Civil Procedure, Art 9. There is no general rule in computing time from an act or event, that the day is to be inclusive or exclusive, it depends on the reason of the thing according to circumstances: Lester v. Garland, 15 Ves. 248 (1808). The expressions "in thirty days," "in thirty days from date," "at thirty days," and "thirty days after date," are synonymous: Ammidown v. Woodman, 31 Me. 580 (1850); Henry v. Jones, 8 Mass. 453 (1812).

A promissory note dated 7th Nov., 1895, and payable "21st Nov. next." is payable on the 21st Nov., 1896, and not on 21st Nov., 1895: Drapeau v. Pominville, Q. R. 11 S. C. 326 (1897).

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When time begins to run.

4. Where a bill is payable at sight, or a fixed period after sight, the time begins to run from the date of the acceptance if the bill is accepted, and from the date of noting or protest if the bill is noted or protested for non-acceptance, or for non-delivery: Imp. Act, s. 14 (3).

This sub-section also reproduces the old law: Campbell v. French, 6 T. R. 200 (1795). A bill need not be noted or protested for non-acceptance, if the drawee do not forthwith accept on its presentment; but if not accepted on that day or within two days thereafter, it must be treated as dishonored or the holder will lose his recourse against the drawer and indorsers: section 42. A bill is protested for non-delivery when the drawee to whom it has been presented wrongly detains it, and refuses either to accept or return it: section 51, s.-s. 8. When a bill, payable after sight, is dishonored and subsequently accepted supra protest, the time runs from the date of protesting for non-acceptance and from the date of acceptance: section 64, s.-s. 5.

Months.

5. The term "Month" in a bill means the calendar month: Imp. Act, s. 14 (4).

This rule has always been followed in mercantile contracts, even when at common law and in statutes it meant a lunar month: Reg. v. Chawton, 1 Q. B. 247 (1841); Webb v. Fairmaner, 3 M. & W. 473 (1838); Hart v. Middleton, 2 C. & K. 10 (1845). In England the change was not made in the interpretation of Statutes until 1850. In Canada it was made in 1849.

Reckoning of time.

6. Every bill which is made payable at a month or months after date becomes due on the same numbered day of the month in which it is made payable as the day on which it is dated—unless there is no such day in the month in which it is

made payable, in which case it becomes due on the last day of that month—with the addition in all cases of the days of grace. R. S. C. c. 123, s. 1. § 14.

This sub-section is not in the Imperial Act, but it corresponds with the English usage: Chalmers, p. 36; also with that of the United States: 1 Daniel, § 624. When enacted in Canada in 1872, the preamble of the Act stated that doubts existed on the point: 35 Vict. c. 10. The last clause of the sub-section as found in the present Act differs from that in the previous Acts which read: "with the addition, in all cases, of the days of grace allowed by law." By section 14, days of grace are allowed "where the bill itself does not otherwise provide." Notwithstanding the clause as it now stands says that they shall be allowed "in all cases," it is hardly to be presumed that it would be held to apply, say to a bill made after date "without grace." The rule will sometimes make bills of different dates on their face having an equal time to run, mature on the same day. For instance, four bills dated respectively, December 28th, 29th, 30th, and 31st, 1902, payable two months from date, would fall due on the 3rd of March, 1903. If made on the same dates in 1903, the first would fall due on the 2nd of March and the other three on the 3rd of March, 1904, on account of 1904 being a leap year.

"Days of Grace."—What was at first a real grace or indulgence granted for the payment of foreign bills subsequently passed into a right. Later it was extended to inland bills, and finally by the Statute of Anne (1704) promissory notes were placed on the same footing. It was held in Wiffen v. Roberts, 1 Esp. 262 (1795), that presentment on the second day was invalid. In England, the United States and Canada, the authorities agreed that days of grace did not apply to bills payable on demand, or those without specification of time, or those expressly payable without grace. The only difference has been with respect to bills payable at sight. For the law as to these, see the notes on section 10.

§ 15.

Days of grace.

In France, days of grace were abolished by the Code de Commerce, Art. 135. Other European countries have done likewise, and they have been abolished in those states of the American Union which have enacted the Negotiable Instruments Laws (§ 145); also in California, Utah, and Vermont. A similar proposal was made in the English Parliament in 1882, but was not adopted. The perpetuation of this practice after the necessity for it has long since disappeared, seems to be at variance with the precision and punctuality that characterize modern commercial transactions.

Where a bill is payable by instalments days of grace are allowed on each instalment: Oridge v. Sherborne, 11 M. & W. 374 (1843).

The allowance of grace in the United States is usually limited to three days as in England, except that in some states it has been varied by statute, and in some localities modified by a well-established usage.

A note or bill dated January 31st, payable "without grace" one month after date, falls due February 28th: Roehner v. Knickerbocker Life Ass. Co., 63 N. Y. 160 (1875).

The following expressions in bills have been held to be a sufficient indication that days of grace are not to be allowed:—"without grace," "no grace," and "fixed." But a memorandum of the due date in the margin is not sufficient.

Non-negotiable notes not payable on demand are entitled to days of grace: Smith v. Kendall, 6 T. R. 123 (1794).

A note, payable "on demand, at sight," was held to be a sight bill and entitled to days of grace: Dixon v. Nuttall, 1 C. M. & R. 307 (1834).

Case of need.

15. The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee

in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he thinks fit. Imp. Act, s. 15. § 16.

This is given by Chalmers as new law. He has reference probably to the last sentence, which settles a point that before the Act had not been decided in England. According to Pothier (Change, No. 137) it had been a disputed point in France whether it was obligatory on the holder to present a bill to the referee in the event of its being dishonored by the drawee. The Civil Code of Quebec made it compulsory. If the bill be unaccepted and there be a drawee au besoin (referee in case of need), presentment must be made in like manner to him also: Art. 2306. "In modern France if the drawee au besoin be named by the drawer, the bill, if dishonored, must be presented to him; if he be named by an indorser it is at the option of the holder": Nouguier, §§ 249, 250. Before a bill is presented to the referee in case of need for payment it must have been protested for non-payment: section 66; or at least have been noted for non-payment: section 92.

16. The drawer of a bill, and any indorser, may insert therein an express stipulation— Optional stipulations by drawer or indorser.

(*a*) Negativing or limiting his own liability to the holder;

(*b*) Waiving, as regards himself, some or all of the holder's duties. Imp. Act, s. 16.

The ordinary liability of the drawer to the holder is that if the bill be dishonored and due notice given he will compensate the latter: section 55. He is in a sense after acceptance surety for the acceptor. The ordinary liability of an indorser to the holder is similar; and he is in the nature of a new drawer: section 55, s.-s. 2. The drawer may stipulate that he shall not be liable on the bill, and then the holder must look alone to the acceptor, and to any indorser who may

§ 16 be liable to him. Or the drawer may limit his liability as to amount or otherwise, and any indorser may do the same. In practice it is not common for drawers to make such a stipulation; indorsers frequently do so. The form in which the latter generally negative liability is by writing before their indorsement the words "sans recours," or "without recourse." For all practical purposes an indorsement "without recourse" may be placed upon the same footing as a note payable to bearer or transferred by delivery. The party so making the transfer does not thereby incur the obligation or responsibility of an indorser: Dumont v. Williamson, 2 U. C. L. J. 219 (1866); Goupy v. Harden, 7 Taunt. 163 (1816); Rice v. Stearns, 3 Mass. 224 (1807); Ticonic Bank v. Smiley, 27 Me. 225 (1847); Hailey v. Falconer, 32 Ala. 536 (1858); Hannum v. Richardson, 48 Vt. 508 (1875).

One who is not the holder of a bill but who simply puts his name on the back of it, and is only a quasi-indorser, may limit his liability by writing "sans recours" after his signature: Wakefield v. Alexander, 17 T. L. R. 217 (1901).

Waiving holder's duties.

The duties of a holder of a bill to a drawer or indorser are to present it for acceptance and payment, or for payment only, according to its tenor, and in case of dishonor to give due notice to the drawer and indorsers, as provided in sections 39 to 52 inclusive. The drawer or any indorser may relieve the holder from these obligations. The usual form of effecting this is by using the words "return without protest," "protest waived," or "notice of dishonor waived." In the United States it has been held that where the waiver is embodied in the instrument itself, it enters into the contract of every party who signs it: Bryant v. Merchants' Bank, 8 Bush (Ky.) 43 (1871); Bryant v. Lord, 19 Minn. 397 (1872); Parshley v. Heath, 69 Me. 90 (1879); Pool v. Anderson, 116 Ind. 94 (18 -); Daniel, §§ 1092, 1093. Such is also the law of France: Cass. 9th Nov. 1870, Dalloz, 70. 1. 350. Our statute would appear to contemplate the restriction of the waiver to the drawer or indorser who expressly waives any of the holder's duties "as regards himself."

Waiver by a curator in Quebec binds the insolvent indorser who has assigned: In re Boutin, Q. R. 12 S. C. 186 (1897); the contrary was held in Denenberg v. Mendelssohn, Q. R. 23 S. C. 128 (1903); Molsons Bank v. Steel, Q. R. 23 S. C. 316 (1903). § 17.

17. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer: Imp. Act, s. 17 (1.) Definition of acceptance

When the drawee writes his name on the bill and delivers it or gives notice he becomes the acceptor and his act is irrevocable: section 21. No one can accept a bill except the drawee or an authorized agent, save the referee in case of need, or an acceptor for honor: sections 14 and 64. Before the law was so strict in requiring an acceptance to be signed by the acceptor, there was also laxity in other respects as will be seen from some of the illustrations given below.

In some instances where a bill is drawn upon the officer of a corporation it is frequently difficult to decide whether the drawee is the corporation or the officer individually. As will be seen from some of the illustrations below the tendency has been to hold the officer personally liable. The maker of a promissory note usually corresponds to the acceptor of a bill. The decisions regarding promissory notes made by officers of corporations show that personal liability is less readily presumed than in the case of bills. The difference arises largely from the rule of the present section that it is the drawee who must accept the bill.

Where a bill is addressed to a firm it is the same in effect as though addressed to all the partners, and the signature of the firm's name by a partner or agent is equivalent to his signing the names of all the partners: section 23 (*b*).

The liability of the acceptor is set out in section 54.

It will be borne in mind that the provisions of this and the following sections apply only to acceptances in Canada.

§ 17. By section 71 the validity of the form of an acceptance is determined by the law of the country where it takes place.

ILLUSTRATIONS.

1. Upon a bill addressed to "P. C. De Latre, Pres. N. D. & H. Co.," and accepted thus,—"Accepted, P. C. De Latre, Pres. N. D. & H. Co.," the acceptor was held personally liable to the payees: Bank of Montreal v. De Latre, 5 U. C. Q. B. 362 (1848).

2. Defendant accepted a bill drawn upon him as treasurer of the Wolfe Island Railway and Canal Co. thus,—"Accepted, W. A. Geddes, Treas., W. I. R. & C. Co.," and affixed the company's seal. Held, that he was personally liable: Foster v. Geddes, 14 U. C. Q. B. 239 (1856).

3. Upon a bill drawn by the secretary of a company upon its president and accepted thus,—"Accepted, Geo. Macbeth, President," both were held personally liable: Bank of Montreal v. Smart, 10 U. C. C. P. 15 (1860).

4. On a bill addressed to "James Glass, Sec. R. G. M. Co.," and accepted thus,—"Accepted, the R. G. M. Co., per Jas. Glass, Sec.," held that the secretary was not the acceptor or personally liable: Robertson v. Glass, 20 U. C. C. P. 250 (1869).

5. A bill was addressed "M. H. Taylor, Tr. C. S. Ry. Co.," and accepted thus,—"Accepted, M. H. Taylor, Tr." Held, that he was personally liable as acceptor to an indorsee who took it as the bill of the company: Laing v. Taylor, 26 U. C. C. P. 416 (1876).

Acceptance of bills.

6. A bill addressed "to the Pres. Midland Railway" was accepted thus,—"For the Midland Railway of Canada, accepted, H. Read, Sec., Geo. A. Cox, President." Held, that the president was personally liable as acceptor: Madden v. Cox, 5 Ont. A. R. 473 (1880).

7. Defendant accepted a bill "as executor of estate J. P." Plaintiff was holder for value without notice. A defence that defendant was liable only as executor was struck out: Campbell v. Mackay, 24 N. S. 404 (1892).

8. A bill addressed to "M. & McQ.," intended for M. McQ. & Co., was accepted by the manager of the latter in the name of "M. & McQ." The firm of M. McQ. & Co. were held not liable as acceptors: Quebec Bank v. Miller, 3 Man. 17 (1885).

9. A bill drawn on "The Board of Managers Presbyterian Church," an unincorporated body, was accepted as follows:—"Accepted D. McLean, Chairman, A. G. Potter, Treasurer." There being evidence that they were respectively the chairman and treasurer of the board, they were held personally liable: McDougall v. McLean, 1 Terr. L. R. 30 (1893).

10. Where a person to whom a bill is not addressed writes an acceptance upon it (not as acceptor for honor) he is not liable as an acceptor: Jackson v. Hudson, 2 Camp. 447 (1810); Polhill v. Walter, 3 B. & Ad. 114 (1832); Davis v. Clarke, 6 Q. B. 16 (1844); Steele v. McKinlay, 5 App. Cas. 754 (1880).

11. A bill addressed to the "Directors of the B. Co.," is accepted by two directors and the manager. The latter is not liable as an acceptor: Bult v. Morrell, 12 A. & E. 745 (1840).

12. A bill addressed to a firm is accepted by a partner in his own name. He is personally liable as an acceptor: Owen v. Van Uster, 10 C. B. 318 (1850). If he accept in the firm name and add his own it does not make him separately liable to an indorsee. Re Barnard, 32 Ch. D. 447 (1886).

13. A bill addressed to a partner is accepted by him in the firm name. He is personally liable, as the firm name is a short form of the partners' names: Nicholls v. Diamond, 9 Ex. 154 (1853).

14. A bill is addressed to the S. S. P. Co., the proper name being the S. S. P. Co., Limited. It is accepted by "J. M., Sec. to the Co." This is not the acceptance of the Company, but under the Companies' Act, J. M. is personally liable: Penrose v. Martyr, E. B. & E. 499 (1858); Atkins v. Wardle, 58 L. J. Q. B. 377 (1889).

15. A bill addressed "to the joint managers of the Royal M. M. Association," is accepted thus,—"Accepted, J. J., W. S., as joint managers of the Royal M. M. Association." Held, that they were personally liable as acceptors: Jones v. Jackson, 22 L. T. N. S. 828 (1870).

16. A bill addressed to the "B. Co." is accepted thus,—"J. S. and H. T., directors of the B. Co." This is an acceptance by the company and not by the directors personally: Okell v. Charles, 34 L. T. N. S. 822 (1876).

17. A bill addressed to "J. B., agent of the L. Co.," is accepted thus,—"Accepted on behalf of the company, J. B." He is personally liable as acceptor: Herald v. Connah, 34 L. T. N. S. 885 (1876); Mare v. Charles, 5 E. & B. 978 (1856).

§ 17.

18. A bill was drawn on a firm in liquidation, and the agent who was winding it up accepted it for his own purposes, in the name of one of the former partners, and in his own. Held, that the former partner was not liable: Odell v. Cormack, 19 Q. B. D. 223 (1887).

19. Two directors and the secretary of "The Bastille Syndicate, Limited," accepted a bill in the name of "The old Paris and Bastille Syndicate, Limited." The company did not pay the bill, and the directors and secretary were held personally liable under section 42 of the Companies' Act: Nassau Press v. Tyler, 70 L. T. N. S. 376 (1894).

Requisites of acceptance.

2. An acceptance is invalid unless it complies with the following conditions, namely :—

(*a*) It must be written on the bill and signed by the drawee. The mere signature of the drawee without additional words is sufficient ;

(*b*) It must not express that the drawee will perform his promise by any other means than the payment of money : Imp. Act, s. 17 (2).

(*a*) "According to the law merchant, an acceptance may be (1) expressed in words, or (2) implied from the conduct of the drawee. (3) It may be verbal or written. (4) It may be in writing on the bill itself or on a separate paper. (5) It may be before the bill is drawn or afterwards. Acceptance by telegram has been held sufficient": Daniel, § 496. In nearly all countries these provisions have been restricted by statute.

In writing

It was held in England that the statute 3 & 4 Anne, c. 9, which was intended to require a written acceptance of inland bills, had not that effect: Wilkinson v. Lutwidge, 1 Str. 648 (1726); Lumley v. Palmer, 2 Str. 1000 (1735); Pillans v. Van Mierop, 3 Burr. 1663 (1765). The Act 1 & 2 Geo. IV. c. 78, was passed to make a written acceptance necessary in such cases, and the Mercantile Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 6, required an acceptance on any bill, foreign or inland, to be in writing and signed by the

drawee. It was held in Hindhaugh v. Blakey, 3 C. P. D. 136 (1878), that the signature alone of the acceptor was not sufficient, and the Bills of Exchange Act, 1878, 41 & 42 Vict. c. 13, was passed to declare the mere signature sufficient. § 17. Acceptance.

In Lower Canada a parol acceptance was formerly held to be sufficient: Lagueux v. Everett, 1 Rev. de Leg. 510 (1817); Jones v. Goudie, 2 Rev. de Leg. 334 (1820). The Act of 1849 required an acceptance to be in writing on the bill, and this was subsequently embodied in the Civil Code, Art. 2292. The same law was introduced into Upper Canada by 7 Wm. IV. c. 5; into Nova Scotia by 28 Vict. c. 10; into New Brunswick by 6 Wm. IV., c. 49; and into Prince Edward Island by 27 Vict. c. 6.

These various provisions were consolidated and made applicable to the whole Dominion in section 4 of chapter 123 of the Revised Statutes of Canada. It is in effect reproduced in the first part of the above clause which says, "It must be written on the bill." As to what is a writing, and what is recognized as a signature, see notes on section 3, ante pp. 33 and 34.

Where on bills. The acceptance and signature of the drawee are usually written across the face of the bill; but its direction and position are immaterial, provided it appear that it was meant to be an acceptance. It may be below the drawee's name or above it, and parallel to it, or it may be even on the back of the bill: Young v. Glover, 3 Jur. N. S. 637 (1857); 1 Daniel, § 498.

Source of law. The whole clause is copied from section 17 of the Imperial Act, the latter part, relating to the signature of the drawee, having been taken from the Mercantile Amendment Act, 1856, and the Bills of Exchange Act, 1878, as stated above. These statutes were not in force in any part of Canada, except the Act of 1856 in Manitoba, British Columbia, and the North-West Territories, having been introduced there as part of the law of England, as mentioned in the introduction. However, the various provincial statutes above

§ 17. mentioned were very similar to the Imperial Act, 1 & 2 Geo. IV. c. 78, and it was held in England that the signature alone of the drawee on the bill was a sufficient acceptance: Leslie v. Hastings, 1 M. & Rob. 119 (1831).

In New Brunswick, under the Act requiring an acceptance to be in writing, a bill was drawn upon a bank payable in three instalments. When the first instalment became due, the cashier paid it, and indorsed on the bill, "Paid on the within $741, Aug. 12, 1861." This was held to be an acceptance for the remaining instalments: Berton v. Central Bank, 10 N. B. (5 Allen), 493 (1863). This would not be an acceptance under the present Act for want of a signature.

In some of the United States the old common law rule of verbal acceptance still prevails. The Negotiable Instruments Law agrees with our own Act: § 220.

Must pay in money.

(*b*) A bill may be varied in certain respects by the acceptance: section 19. But the drawee does not become an acceptor if he proposes to satisfy the bill in anything except money. This was the old law. As to what is money, see notes on section 3, ante p. 38.

An acceptance to pay by another bill is not an acceptance: Russell v. Phillips, 14 Q. B. 891 (1850).

A Promise to Accept is not an acceptance. The drawee who gives such a promise may be held liable on his contract by estoppel, but not as an acceptor. So if what would formerly have been acceptance is written elsewhere than on the bill: See Bank of Montreal v. Thomas, 16 O. R. 503 (1888). Torrance v. Bank of British North America, 17 L. C. J. 185: L. R. 5 P. C. 247 (1873); Dunspaugh v. Molsons Bank, 23 L. C. J. 57 (1878); Maritime Bank v. Union Bank, M. L. R. 4 S. C. 244 (1888); Coolidge v. Payson, 2 Wheaton, 66 (1817); Ilsley v. Jones, 12 Gray, 260 (1858); Riggs v. Lindsay, 7 Cranch (U. S.) 500 (1813).

A verbal promise to accept was insufficient under the old law, when a verbal acceptance was binding: Johnson v. Collings, 1 East, 98 (1800); Bank of Ireland v. Archer, 11

M. & W. 383 (1843); Kennedy v. Geddes, 8 Porter (Ala.) 268 (1839).

§ 18.

3. Where in a bill the drawee is wrongly designated or his name is misspelt, he may accept the bill as therein described, adding, if he thinks fit, his proper signature, or he may accept by his proper signature.

Wrong name for drawee.

This sub-section is not in the Imperial Act, but the same principle as to a payee or indorsee is found in section 32, s-s. 2, and it is in harmony with commercial usage. It was inserted in the bill at the suggestion of the Toronto bankers: Commons Debates, 1890, p. 109. When section 32 was under consideration in the Senate a member of that body suggested that the words "if he thinks fit" should be omitted, on the ground that if a man adopted a wrongful designation or name that was not his own, he should be compelled to do so over his proper signature. The suggestion was adopted, and the words struck out: Senate Debates, 1890, p. 572. It was apparently not observed that a like expression was used in this section. We have consequently the anomaly that it is optional with a drawee to add his proper signature, but compulsory on a payee or indorsee.

18. A bill may be accepted—

(*a*) Before it has been signed by the drawer, or while otherwise incomplete;

Time for acceptance.

(*b*) When it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment: Imp. Act, s. 18 (1), (2).

"(*a*)" The acceptance may be upon a blank paper, and if delivered to be filled up as a bill it is binding, and any other material particular in respect to which the bill may be incomplete, the person in possession has a prima facie authority to supply in any way he thinks fit: section 20. By

§ 18. section 88 this is one of the sections not applicable to a promissory note. The signing of an incomplete note by the maker is however covered by the rule laid down in section 20, which does apply to promissory notes.

For illustrations of the foregoing see the notes to section 20.

"(*b*)" A bill accepted when overdue is payable on demand: section 10, s-s. 2. After a bill has been refused acceptance, and notice of dishonor has been given, the holder may apply to the referee in case of need if there be one named in the bill: section 15; or it may be accepted for honor by a third person: section 64; or the drawee himself may change his mind and accept: Wynne v. Raikes, 5 East, 514 (1804). If he should do so, the date from which time should run is fixed by the next sub-section.

Acceptance after dishonor.

2. When a bill payable at sight or after sight is dishonored by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance. Imp. Act, s. 18, (3); 54-55 Vict. c. 17, s. 3.

This sub-section in the Act of 1890 was copied verbatim from the Imperial Act, which does not contain the words "at sight or" in the first line. It was another instance of the omission of the change necessary to make the Act consistent with the decision to continue to allow days of grace on sight bills. These words were added by the amending Act of 1891, thus putting all bills payable at a certain time after acceptance on the same footing.

This sub-section is new law, and is designed to place all parties in the same position as if the bill had been accepted when first presented: section 42; or as if accepted by a referee in case of need or by an acceptor for honor: section 66. The date of the first presentment, notwithstanding the words of

the Act, will probably be held to be fixed by the date of the protest for non-acceptance, which may be two days later than the actual first presentment: section 42. § 19.

The words of the sub-section are ambiguous; but it is likely that they will be held not to be sufficiently strong to place a drawee in a worse position than he would be under sub-section 2 of section 42.

If the holder took an acceptance of a later date, it would be a qualified acceptance and he would do so at his own risk: section 44.

19. An acceptance is either (*a*) general, or (*b*) qualified: a general acceptance assents without qualification to the order of the drawer; a qualified acceptance in express terms varies the effect of the bill as drawn: Imp. Act, s. 19 (1). General and qualified acceptance.

The usual way of accepting a bill generally, is for the drawee simply to write his name across the face of the bill with the word "accepted," adding the date if it be payable at or after sight. It is sufficient if he simply sign his name: section 17. He may also name a particular specified place of payment as provided in the next sub-section without making his acceptance a qualified one. The definitions of a general and qualified acceptance as given above are taken from the Imperial Act without change, but the effect of the change made in the next sub-section and in sections 45 and 52 is to materially change the law.

The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain a general acceptance he may treat the bill as dishonored by non-acceptance: section 44. An acceptance will be construed as a general one wherever practicable, and a memorandum of a wrong due date in a bill was held not to vary its effect or to be a qualified acceptance, but that anything in an acceptance contrary to the tenor of the bill should be in the clearest language: Fanshawe v. Peet, 26 L. J. N. S. 314 Ex. (1857).

§ 19.

A bill of exchange being drawn by L. D. Flipo, payable "to order L. D. Flipo," the drawees erased the word "order," and accepted the bill "in favor of L. D. Flipo only, payable at the Alliance Bank, London." In an action upon the bill by the indorsees for value against the acceptors it was held by the English Court of Appeal, reversing the decision of the lower Court, that the acceptance did not vary the effect of the bill, as drawn, and that it was a general acceptance of a negotiable bill, and the action was maintainable: Decroix v. Meyer, 25 Q. B. D. 343 (1890). The decision was affirmed by the House of Lords: [1891] A. C. 520.

If a qualified acceptance is taken, it discharges the drawer and indorsers if they have not authorized it, or disapprove on receiving notice: section 44.

2. In particular, an acceptance is qualified which is—

Qualified acceptance.

(*a*) Conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated; but an acceptance to pay at a particular specified place is not conditional or qualified.

(*b*) Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;

(*c*) Qualified as to time;

Qualified acceptance.

(*d*) The acceptance of some one or more of the drawees, but not of all. Imp. Act, s. 19 (2).

This sub-section is taken chiefly from section 19 of the Imperial Act, but some changes have been made, the full effect of which it may be difficult to foretell, when taken in connection with the changes made in sections 45 and 52. In the Imperial Act, clause (*a*) ends with the word "stated," and the following appears among the qualified acceptances, "(*c*) local, that is to say, an acceptance to pay only at a

specified place. An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere." § 19.

At particular place

Prior to 1820 it was a point much disputed in England whether a bill made or accepted payable at a particular place required to be presented there in order to charge the acceptor, drawer and indorsers. In Rowe v. Young, 2 B. & B. 165 (1820) it was decided by the House of Lords that such an acceptance was a qualified acceptance, rendering it necessary in an action against the acceptor to prove presentment at such place. The practice of making bills payable at a banker's had become general and was found to be a great convenience. If this were held to be a qualified acceptance it would require the assent of the drawer and indorsers. To overcome the effect of the decision in Rowe v. Young, the Act 1 & 2 Geo. IV. c. 78, was passed, declaring an acceptance to pay at a particular place a general acceptance, unless made payable there "only and not otherwise or elsewhere." Clause (c) of section 19 of the Imperial Act above quoted is a reproduction of this Act. A similar Act applicable also to promissory notes was passed in Upper Canada in 1837 as 7 Wm. IV. c. 5. This was embodied in the Con. Stat. U. C. c. 42, as sections 5 and 6, and appears in chapter 123 of the Revised Statutes of Canada, 1886, as section 16, but remained applicable to Ontario alone, and was repealed by the present Act. For cases where bills and notes omitting the restrictive words were held to be payable generally, see Commercial Bank v. Johnston, 2 U. C. Q. B. 126 (1845), and Bank of U. C. v. Parsons, 3 U. C. Q. B. 383 (1846). On such a note payable in Scotland or the United States the holder could not recover the difference of exchange or the damage allowed on foreign notes: Wilson v. Aitkin, 5 U. C. C. P. 376 (1855); Meyer v. Hutchinson, 16 U. C. Q. B. 476 (1858); Hooker v. Leslie, 27 U. C. Q. B. 295 (1868). A clause to the same effect was made applicable to Lower Canada in 1849 by 12 Vict. c. 22, s. 7; but it was repealed the next year by 13 & 14 Vict. c. 23, and replaced by the following which

§ 19. subsequently appeared in the Civil Code as Art. 2307: "If a bill of exchange be made payable at any stated place, either by its original tenor or by a qualified acceptance, presentment must be made at such place." In Prince Edward Island an Act to the same effect as 1 & 2 Geo. IV. c. 78, was passed, 27 Vict. c. 6. This was repealed by the Revised Statutes of Canada, 1886, Schedule A, p. 2274.

Changes in bill.

In the Canadian bill as introduced in 1889, section 19 was identical with the Imperial Act. There was a strong expression of opinion against the principle of the Act 1 & 2 Geo. IV. c. 78, especially against requiring the words "only and not otherwise or elsewhere," and when the bill was introduced in 1890 the second sentence of clause (*c*) of the Imperial Act was omitted entirely. While the bill was before the Senate it was further amended and put in its present form by omitting the whole of the original clause (*c*), and adding to clause (*a*) the words: "but an acceptance to pay at a particular specified place is not conditional or qualified." To appreciate the full effect of this change the present section must be read in connection with sections 44, 45 and 52, and the reader is referred specially to section 45, s-s. 2 (*d*) (1), and to section 52, s-s. 2, and the notes on these sub-sections.

Effect of changes.

The effect of the Canadian Act would appear to be this: When the drawer has not named a particular place of payment, the acceptor may name a place in his acceptance, and this will be a general acceptance which must be taken by the holder, and of which he need not give notice to the drawer or indorsers in order to hold them liable on the bill: section 44. Where a place of payment is specified either in the bill as originally drawn or in the acceptance the bill must be presented there or the drawer and indorsers will be discharged: section 45. The acceptor is not discharged by the omission to present the bill for payment on the day that it matures, but if he is sued before presentation the costs are in the discretion of the Court: section 52, s-s. 2.

Meaning of place.

A difficulty may possibly arise if the drawee should, by his acceptance, make the bill payable in another town. This

§ 19.

would literally be within the words of the Act as "an acceptance to pay at a particular specified place," and being a general acceptance the holder could not refuse it, or protest the bill for non-acceptance. It might be very inconvenient for the holder of a bill drawn upon a person in Toronto, if the latter could accept it payable at New York, Chicago or Winnipeg, and require the holder to present it there in order to bind the drawer and indorsers. The Courts may possibly restrict the word "place" to a bank or other place in the town or locality which is given in the bill as the address of the drawee, and treat an acceptance to pay in another town as a qualified acceptance. There appears, however, to be nothing in the context or in the Act to require such a construction, and "place of payment" in section 45, s-s. 2 (*d*), (1) and (2), and in section 52 is distinguished from the address of the drawee as given in the bill. A few words limiting it to the town or locality where the drawee is addressed, or within a certain limited distance, would have removed all uncertainty. It was held in the State of New York that where a bill addressed to "E. C. H., of New York," was "accepted payable at the American Exchange Bank, Clayville Mills," which was in another county, it was a qualified acceptance: Walker v. Bank of N. Y., 13 Barb. 636 (1852); so also where a bill addressed A. Y. & Co., at Cobourg, Upper Canada, was accepted "payable at the Bank of Upper Canada, Port Hope"; Niagara District Bank v. Fairman, 31 Barb. 403 (1860).

If the bill as drawn specifies a particular place of payment, and the acceptance names a different one, this would be such a variance as would make the acceptance a qualified one: Rowe v. Young, 2 B. & B. 165 (1820).

Conditional Acceptance.—A bill of exchange is an unconditional order to pay; but the acceptance may be conditional without destroying its validity. On the fulfilment of the condition it becomes absolute and the acceptor liable: Miln v. Prest, 4 Camp. 393 (1816).

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Conditional acceptance.

Where the acceptance on a bill is unconditional, parol evidence cannot be received to show that it was accepted conditionally: Bradbury v. Oliver, 5 U. C. O. S. 703 (1839). Conditional acceptances were not recognized in the old French law: Pothier, Change, No. 47: nor are they under the Code de Commerce: Art. 124. England and the United States are said to be the only countries which acknowledge them.

The following are examples of conditional acceptances:—

1. If a certain house shall be finished: Dufresne v. Jacques Cartier Building Society, 5 R. L. 235 (1873).

2. When in funds from the estate of C.: Potters v. Taylor, 20 N. S. (8 R. & G.) 362 (1888).

3. Provided they shall have earned that sum: McLean v. Shields, 1 Man. 278 (1884).

4. When certain debentures are sold: Ontario Bank v. McArthur, 5 Man. 381 (1889).

5. As soon as he should sell such goods: Smith v. Abbott, 2 Strange 1152 (1741).

6. As remitted for: Banbury v. Lissett, 2 Strange, 1211 (1744).

7. When he would obtain those funds from France: Mendizabal v. Machado, 3 Moore & S. 841 (1833).

8. On condition that it be renewed: Russell v. Phillips, 14 Q. B. 891 (1850).

9. On giving up bills of lading: Smith v. Vertue, 9 C. B. N. S. 214 (1860).

(*b*) **Partial Acceptance.**—A bill may be validly accepted for part: Petit v. Benson, Comberbach, 452 (1697): Wegersloffe v. Keene, 1 Str. 214 (1709). In this form of qualified acceptance, the drawer and indorsers have no opportunity of freeing themselves by their dissent. The holder should give due notice of the partial dishonor: section 44, s.-s. 2; Pothier, Change, No. 49; Code de Commerce, Art. 124.

(*c*) **Qualified Acceptance as to Time.**—The acceptor may vary the time of payment named by the bill; and if none

be named he may fix a time and he will be bound by it: Walker v. Atwood, 11 Mod. 190 (1709); Russell v. Phillips, 14 Q. B. 891 (1850); Pothier, Change, No. 49. § 20

(*d*) **Acceptance by Part of Drawees.**—If there are several drawees and they do not all accept, those who do are bound. A partner may accept in his own name a bill addressed to his firm and it is a valid acceptance: Owen v. Van Uster, 10 C. B. 318 (1850).

The list of qualified acceptances given in this section may not cover the whole ground. Any acceptance which by its terms varies the effect of the bill as drawn would be a qualified acceptance, although it might not literally be within any of the classes enumerated. Of the corresponding section in the Imperial Act, the Master of the Rolls says, in Decroix v. Meyer, 25 Q. B. D. 348 (1890):—"I think it is true to say in section 19 of the Act the examples given of a qualified acceptance are not exhaustive and that there might be other cases of qualified acceptances, when the acceptance in express terms varied the effect of the bill as drawn."

20. Where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit: Imp. Act, s. 20 (1). Inchoate instruments.

This section applies to notes as well as to bills, and is copied from the Imperial Act with the omission of the reference to stamps. In England the signature must be on "blank stamped paper," and it can only be filled up for an amount that "the stamp will cover." This is a great aid

§ 20. in checking fraud. It is to be observed that the paper must have been delivered by the signer in order that it might be converted into a bill or note, and the onus of proving the delivery is on the holder. Once it is proved that it was so delivered, the onus is shifted, and it is then for the signer to prove that it was not filled up within a reasonable time or in accordance with the authority given. The particular case of an undated bill which is payable at a fixed period after date, or an undated acceptance of a bill payable at sight or at a fixed period after sight, had already been provided for by section 12.

ILLUSTRATIONS.

1. Where the payee of a note indorsed it with the date and amount blank, he was liable to an innocent indorsee for the note as filled up: Sandford v. Ross, 6 U. C. O. S. 104 (1841).

2. An indorser of a note who signs before the maker or payee and before the amount is filled up, is liable on the note as completed: Rossin v. McCarty, 7 U. C. Q. B. 100 (1849).

Inchoate instruments.

3. The maker of a note delivered it with the amount in blank. It was fraudulently filled up for \$855. He was held liable to an innocent indorsee: McInnes v. Milton, 30 U. C. Q. B. 489 (1870).

4. Where defendant indorsed as payee a note for \$500, on which there was a blank space to the left of the word "five," which the maker fraudulently filled up with the word "twenty," the indorser was held liable for \$2,500 to an innocent indorsee: Dorwin v. Thomson, 13 L. C. J. 262 (1869).

5. A writing in the form of a note, which was written over the signature of the maker, given merely for the purpose of indicating his address, cannot be recovered on: Ford v. Auger, 18 L. C. J. 296 (1874).

6. Where a signature was obtained ostensibly for a receipt, and a note was written over it, the signer is not liable: Banque Jacques Cartier v. Lescard, 13 Q. L. R. 39 (1886).

7. A note, signed in blank and sent with instructions to be filled up for \$115, was filled up for \$461. Held, that the maker was liable for the full amount to a holder in due course: Bank of Nova Scotia v. Lepage, M. L. R. 6 S. C. 321 (1889).

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Inchoate instruments.

8. A note payable to —— or order cannot be recovered by the person to whom it was given, either as payee or bearer, without inserting his name in the blank as payee: Mutual Safety Ins. Co. v. Porter, 7 N. B. (2 Allen) 230 (1851).

9. A note with a blank for the name of the payee, and the rate of interest was filled up with the name of the first indorser as payee, and with a reasonable rate of interest by a subsequent indorser. It was held to be good: Burton v. Goffin, 5 B. C. R. 454 (1897).

10. A note with a blank for the rate of interest was filled up with the figures 18, and was held good: Brit. Col. [illegible] v. Ellis, 6 B. C. R. 80 (1898).

11. A. indorsed a note for the accommodation of the maker on condition that B. should indorse also. The maker [illegible] without B.'s indorsement. Held, that a holder in due course could [illegible] from A.: Ontario Bank v. Gibson, 3 Man. 406 (1886); 4 Man. 440 (1887).

12. A bill is drawn payable to —— or order. Any holder for value may write his own name in the blank and sue on the bill: Crutchly v. Mann, 5 Taunt. 529 (1814).

13. A note is signed by one maker on condition that another sign as joint maker. The person to whom he gives it fills it up without the other signature and negotiates it. A holder in due course cannot recover: Awde v. Dixon, 6 Ex. 869 (1851).

14. Where a blank acceptance was stolen from the desk of the signer and filled up, he was held not liable to a holder in due course: Baxendale v. Bennett, 3 Q. B. D. 525 (1878).

15. Three bills of exchange were accepted by defendant without a drawer's name and handed to B. in payment of bets. B. subsequently, for consideration, handed the bills to the plaintiff who signed his own name to them as drawer and sued the defendant on them. Held, that the Gaming Act, 1892, did not apply, and that the defendant was liable: Faulks v. Atkins, 10 T. L. R. 178 (1893).

When to be filled up.

2. In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given;

§ 20. reasonable time for this purpose is a question of fact:

As to subsequent holder.

Provided, that if any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given. Imp. Act, s. 20 (2).

Where a party received a note with instructions to fill it up for £15, but filled it up for £30, the stamp being sufficient for the latter sum, and gave it to the payee for value and without notice of the breach of authority, the payee was held not entitled to the benefit of this proviso, it being held that the note was not "negotiated" to him but "issued" Herdman v. Wheeler,]1902[1 K. B. 361.

Where a contract imports performance within a reasonable time, extrinsic evidence of all the material circumstances is necessarily admissible to determine what is a reasonable time for the purpose: Ellis v. Thompson, 3 M. & W. 445 (1838); Attwood v. Emery, 1 C. B. N. S. 110 (1856); Goodwyn v. Cheveley, 4 H. & N. 631 (1859); Brighty v. Norton, 3 B. & S. 305 (1862); Toms v. Wilson, 4 B. & S. 455 (1863); Hales v. London & N. W. Ry., 4 B. & S. 66 (1863).

It is for the party seeking to enforce the bill to account for the delay if it has been unusual.

Where a debtor gave his creditor a blank promissory note and subsequently failed, and the creditor did not fill up the note until after he had obtained his discharge five years later, the jury found that the delay was not unreasonable under the circumstances and the verdict was upheld: Temple v. Pullen, 8 Ex. 389 (1853).

The word "completion" in the proviso does not include delivery: Herdman v. Wheeler, [1902] 1 K. B. at p. 371.

"**The Authority Given.**"—The onus is on the signer seeking to escape liability to prove that the authority given has been exceeded, as the holder has prima facie authority to fill up as he sees fit: Anderson v. Somerville, 1 Rettie (5th series), 36 (1898). If no instructions have been given or are proved, the bill will be upheld. Any person taking a bill in an incomplete state is exposed to this defence, except in the case of the want of a date in section 12. Death revokes the authority to fill up a bill unless the holder be a holder for value. The liability of the signer begins when the bill is first issued complete in form, and not when he signs. § 20.

"**Holder in Due Course.**"—The preceding limitations, as to time and authority, have no application to one who takes a bill complete and regular on the face of it before maturity, in good faith and for value without notice of dishonor or defect: sections 29 and 38; Hanscome v. Cotton, 15 U. C. Q. B. 42 (1857); Merchants' Bank v. Good, 6 Man. L. R. 339 (1890). The instrument so taken must have been originally delivered as a bill or delivered in an incomplete state in order that it might be converted into a bill.

ILLUSTRATIONS.

1. A partner having authority to do so gives a blank acceptance in the name of his firm and dies. It may be filled up and enforced against the surviving partners: Usher v. Dauncey, 4 Camp. 97 (1814).

2. After the death of the signer of an accommodation acceptance it was filled up in the presence of a person who discounted it. The latter cannot recover from the estate of the acceptor: Hatch v. Searles, 2 Sm. & G. 147 (1854).

3 A debtor gives a blank acceptance to a creditor who dies without filling it up. The administrator has a right to fill it up using his own name as drawer: Scard v. Jackson, 24 W. R. 159; 34 L. T. N. S. 65 (1875).

4. A partner gives without authority a blank acceptance of his firm. It is subsequently negotiated in an incomplete state to a holder for value who completes it. The latter cannot recover on the bill: Hogarth v. Latham, 3 Q. B. D. 643 (1878).

§ 21.

5. A debtor gives his creditor a blank acceptance and dies. The creditor may fill in his own name as drawer and payee and recover from his debtor's estate: Carter v. White, 20 Ch. D. 225 (1882); 25 Ch. D. 666 (1883).

6. An acceptance is signed with £4 in the margin, but with the amount blank in the body of the bill. It is fraudulently filled up for £40 and the margin altered to £40. The acceptor is liable to a holder in due course for £40: Garrard v. Lewis, 10 Q. B. D. 30 (1882).

7. A bill without date and payable "—— months after date" was filled up with the date Sept. 24th, 1887, and made payable 18 months after date. Held, that it was valid in the hands of a bona fide holder for value: Morgans v. Heskett, 6 T. L. R. 162 (1890).

8. Plaintiff accepted bills without dates or drawers' signatures, and gave them to an agent with authority to fill up when cash was given plaintiff for them. He filled up dates and induced defendant to sign as drawer after his authority had been revoked. They were indorsed to bona fide holders for value, and plaintiff was obliged to pay. The jury found that defendant acted in good faith but negligently. Held, that plaintiff was entitled to recover the amount he was obliged to pay: Watkin v. Lamb, 17 T. L. R. 777 (1901); 85 L. T. 483.

Contract not complete until delivery.

21. Every contract on a bill, whether it is the drawer's, the acceptor's or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto:

Exception

Provided, that where an acceptance is written on a bill, and the drawee gives notice to, or according to the directions of, the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable: Imp. Act, s. 21 (1).

Delivery has been defined in section 2 as the transfer of possession, actual or constructive, from one person to another; and it is here used in that sense. The acceptance must be in writing, but the notification may be either written or verbal. Delivery is necessary also to render the contract

of the maker or indorser of a promissory note complete and irrevocable. § 21

"Delivery is the final step necessary to perfect the existence of any written contract; and, therefore, as long as a bill or note remains in the hands of the drawer or maker it is a nullity. And even though it be placed by the drawer or maker in the hands of his agent for delivery, it is still undelivered so long as it remains in his hands, and may be recalled": 1 Daniel, § 63.

ILLUSTRATIONS.

1. Where the secretary of a company, intending to give a renewal note of the company, signed his name with the word "per" before it, leaving a space before his signature for the stamp of the company, and sent it to the manager, who signed the note but omitted to insert the company's name, and delivered it to the creditor, it was held, that the instrument never was perfected or delivered as a promissory note and the secretary was not liable as maker: Brown v. Howland, 9 O. R. 48 (1885); affirmed, 15 Ont. A. R. 750 (1887).

2. Where a drawee has written his acceptance on the bill, but cancels it and returns it to the holder, who has it noted for non-acceptance, the drawer is not liable as an acceptor: Bentinck v. Dorrien, 6 East, 199 (1805).

3. Where a drawee, after writing his acceptance on the bill, changes his mind, and instead of notifying the holder or delivering the bill, erases his acceptance, he is not liable as an acceptor: Cox v. Troy, 5 B. & Ald. 474 (1822).

4. A debtor made a promissory note in favor of his creditor for the amount of his claim, but died before delivering it. If given to the creditor subsequently it is not a valid note: Bromage v. Lloyd, 1 Ex. 32 (1847).

5. A partner who is also agent for a creditor of the firm, indorses the firm's name on a bill, and places it among some other papers of the creditor which he has. This is a valid indorsement by the firm and a delivery to the creditor: Lysaght v. Bryant, 9 C. B. 46 (1850).

6. The drawee writes an acceptance on a bill left with him. The holder calls for it next day and is told it is mislaid. The drawee

§ 21. hears that the drawer has failed and erases his acceptance. The following day he delivers the dishonored bill to the holder. This is not an acceptance: Bank of Van Diemen's Land v. Bank of Victoria, L. R. 3 P. C. 526 (1871).

7. By the delivery of a note to the trustee under a composition deed, the creditor, who is the payee, acquires no property in it: Latter v. White, L. R. 5 H. L. 578 (1872).

8. A letter when posted becomes the property of the party to whom it is addressed. If it contains a bill, this is a delivery: Ex parte Coté, L. R. 2 Ch. 27 (1873).

9. A bill is specially indorsed and inclosed in a letter addressed to the indorsee. It is placed in the office letter box of the indorser, but before posting or delivery is stolen by a clerk, who forges an indorsement and negotiates it. The property in the bill remains in the indorser: Arnold v. Cheque Bank, 1 C. P. D. 584 (1876).

Requisites as to delivery.

2. As between immediate parties, and as regards a remote party, other than a holder in due course, the delivery—

(*a*) In order to be effectual must be made either by or under the authority of the party drawing, accepting or indorsing, as the case may be;

(*b*) May be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

When valid delivery presumed.

But if the bill is in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him, so as to make them liable to him, is conclusively presumed.

Prima facie evidence.

3. Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved. Imp. Act, s. 21 (2), (3).

"Immediate parties" are those who have direct dealings with each other in relation to a bill, such as drawer and

acceptor, drawer and payee, indorser and next indorsee. A "remote party" taking a bill incomplete or irregular on its face, or after maturity, or with notice of a defect, or without giving value, is in no better position. For the definition of a "holder in due course," see section 29. § 21.

Where a bill has been delivered conditionally or for a special purpose only, and the person who has so received it violates his trust, the owner may recover the bill or its amount from such person or anyone who has taken it with notice: Goggerley v. Cuthbert, 5 B. & P. 170 (1806); Alsager v. Close, 10 M. & W. 576 (1842); Muttyloll Seal v. Dent, 8 Moore, P. C. 319 (1853); Arnold v. Cheque Bank, 1 C. P. D. 585 (1876); Burson v. Huntington, 21 Mich. 415 (1870).

Where a promissory note was indorsed on the understanding that it should be available only on the happening of a certain condition, it is not binding where the condition has not been fulfilled. Plaintiff's agent took the note with knowledge of the condition. This was notice to the bank as it was not shown that the agent was a party to a fraud upon it, and it was not enough to show that he had an interest in deceiving the bank: Commercial Bank of Windsor v. Morrison, 32 S. C. R. 98 (1902).

The maker of a promissory note alleged on his examination that he made and delivered the note to a company for a purpose other than that for which the company deposited it with the plaintiff the payee of the note. He did not allege that plaintiff had notice of this, or allege fraud, but merely that plaintiff took the note without consideration. Held, no defence: Ontario Bank v. Young, 2 O. L. R. 761 (1901).

Escrow.—A bill or note may be delivered conditionally, and upon the happening of the event or fulfilment of the condition, no further delivery is necessary. What was before a mere paper writing becomes a valid bill. In the case of a deed the custodian must be a third party. In Bell v. Ingestre, 12 Q. B. 317 (1848), Lord Denman held that the same principle applied to indorsees who received bills as trustees. The death of the parties liable does not prevent the

§ 21. Escrow.

bill taking effect: Belden v. Carter, 4 Day 66 (1809); Giddings v. Giddings, 51 Vt. 227 (1878). "There is this distinction between negotiable and sealed instruments: If the custodian of the former betrays his trust, and passes off the negotiable instrument to a bona fide holder before maturity, and without notice, all parties are bound; but if the instrument be sealed, the rule is otherwise": 1 Daniel, § 68. A bill, complete in form, put into the hands of a third party as an escrow is not a valid bill, but a mere paper writing until the happening of the condition: Chandler v. Beckwith, 2 N. B. (Berton), 423 (1838).

ILLUSTRATIONS.

1. The payee of a promissory note, after a writ of attachment had issued against him, for value indorsed it to a bona fide holder before its maturity. Held, that the indorsee had no title, as it had vested in the assignee before its indorsement or delivery: Jenks v. Doran, 5 Ont. A. R. 558 (1880). (But would not the indorsee as a holder in due course now be within the provisions of the last clause of sub-section 2?)

2. The payee of a note which was delivered to him conditionally sues upon it. The maker may show that the condition was not complied with: Jefferies v. Austin, 1 Stra. 674 (1725).

3. A bill was delivered by the acceptor to the drawer for a purpose for which it became unnecessary. The drawer indorsed it for value to a person who was aware he had no right to do so. The property in the bill remained in the acceptor: Evans v. Kymer, 1 B. & Ad. 528 (1830).

4. The payee of a bill gave it to a friend to get it discounted. The latter had to indorse it to get it discounted, and only received a part of the proceeds. The person who discounted it was aware of the facts. The payee could show the nature of the delivery and recover the balance of the proceeds: Bastable v. Poole, 1 C. M. & R. 410 (1834).

5. Defendant drew on one who was a debtor of himself and plaintiff jointly. The debtor accepted and defendant indorsed and delivered the bill to plaintiff to collect. It was dishonored and plaintiff sued defendant as indorsee. Held, that this was not an indorsement and delivery that would pass the property: Denton v. Peters, L. R. 5 Q. B. 475 (1870).

6. In an action by the payee of a promissory note against the maker, evidence is admissible to show a parol agreement at the time of the making of the note, that it should not become operative as a note until the maker could examine the property for which it was given, and determine whether he would purchase it: Burke v. Dulaney, 153 U. S. 228 (1894). § 21.

The last clause of sub-section 2 and sub-section 3 afford examples of the two kinds of presumptions of law, namely, conclusive and disputable as they are designated in the language of English law; or legal presumptions and presumptions juris et de jure, as they are called in the language of the civil law. "Conclusive presumptions of law are rules determining the quantity of evidence requisite for the support of any particular averment which is not permitted to be overcome by any proof that the fact is otherwise. . . . They have been adopted by common consent, from motives of public policy, for the sake of greater certainty, and the promotion of peace and quiet in the community: and therefore it is, that all corroborating evidence is dispensed with, and all opposing evidence is forbidden": 1 Taylor, § 71. In disputable presumptions, the "law defines the nature and amount of the evidence which is sufficient to establish a prima facie case, and to throw the burden of proof on the other party; and if no opposing evidence is offered, the jury are bound to find in favor of the presumption. A contrary verdict may be set aside as being against evidence": 1 Taylor, § 109. "Legal presumptions are those which are specially attached by law to certain facts. They exempt from making other proof those in whose favor they exist; certain of them may be contradicted by other proof; others are presumptions juris et de jure and cannot be contradicted": C. C. Art. 1239. Presumptions.

Capacity and Authority of Parties.

22. Capacity to incur liability as a party to a bill is co-extensive with capacity to contract: Capacity of parties.

§ 22.

As to corporations.

Provided, that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor or indorser of a bill, unless it is competent to it so to do under the law for the time being in force relating to such corporation: Imp. Act, s. 22 (1).

Under the British North America Act, s. 92, s-s. 13, the Local Legislatures have the exclusive right, under the head of "civil rights," to legislate regarding the capacity to contract, except as to corporations created by or under the authority of the Dominion Parliament, and they may be subject indirectly to Dominion legislation regarding some of the other subjects enumerated in section 91. The first sentence of this section, like the greater part of the Act, is taken without change from the Imperial Act. In England it could not give rise to any question, except as to contracts made abroad. Here it is open to question as to how far it would prevail, if it clashed with a provincial law on the subject. It would no doubt have effect to this extent at least, that no person having capacity to contract by provincial law is rendered incapable of contracting as to bills and notes by the present Act.

Conflict of laws.

The practical difficulty that will at once arise will be as to which provincial law is to govern where that of more than one province is to be applied. The law of Quebec as to capacity differs considerably from that of most of the other provinces, and the intimate commercial relations between that province and the others will soon bring these questions before the Courts. The point to be determined in such cases, is whether the law of the domicile of the person, or the law of the place where the contract is made, or of the place where it is to be performed, is to control. The law in Quebec is explicit, and adopts the civil law rule in favor of the domicile. The Civil Code says:—"Art. 6. An inhabitant of Lower Canada, so long as he retains his domicile therein, is governed by its laws respecting the status and capacity of persons." The law of the other provinces can

hardly be said to be settled, as the question of the capacity to contract appears seldom to have come before the Courts when there has been a conflict. Judging from analogy, the leaning appears to be towards the law of the domicile. In the United States, on the other hand, the law of the place of the contract is generally followed as to the capacity of the contracting parties: Story on Conflict of Laws, s. 102. In England the question does not seem to be authoritatively settled. "When the capacity of a person to act in any given way is questioned on the ground of his age, it is still perhaps uncertain whether the solution of the question will be referred in England to a personal law," that is to the law of the domicile: Westlake, p. 43. "The capacity to contract is regulated by the law of the domicile," per Halsbury, C., in Cooper v. Cooper, 13 App. Cas. 99 (1888). In this case Lords Watson and Macnaghten declared against the lex loci solutionis as regulating the capacity to contract, but expressed no clear opinion between the law of the domicile and the lex loci contractus, which happened to be the same. "When the capacity of a married woman to act in any given way is questioned on the ground of her coverture, it would seem that the choice between the lex loci contractus and her personal law, as deciding the question, should follow whatever may be laid down as to the similar choice when capacity is questioned on the ground of age": Westlake, p. 47.

§ 22.

Conflict of laws.

It is provided by section 84 of the Bank Act, 53 Vict. c. 31, that any person although not qualified to enter into ordinary contracts may make deposits up to $500 and withdraw the money without the authority or assistance of any person or official. This would authorize the drawing of cheques by such disqualified persons. By section 16 of the Savings Bank Act, 53 Vict. c. 32, deposits may be made in Quebec by such persons to the amount of $2,000.

The principal classes of persons without full capacity to contract are:

1. Infants or Minors.—As the age of majority throughout the Dominion, as in England, is fixed at 21, conflict will

§ 22. not arise as to these, except probably as to minors emancipated under the law of Quebec by marriage, or by the Court, whereby they acquire a restricted right to contract: C. C. Arts. 314-322; or by engaging in trade when they are reputed of full age for all acts relating to such trade: Art. 323. A promise or ratification after majority to pay a debt or obligation contracted during minority, is only binding when in writing: C. C. Art. 1235 (2); R. S. O. c. 146, s. 6.

2. Idiots, Lunatics and Interdicted Persons.—The rule in Quebec is that all acts subsequent to interdiction for imbecility, madness, or insanity are null and void; previous acts may be annulled if injurious: C. C. Arts. 334, 335. So of the acts of persons interdicted for prodigality: C. C. Art 987; and for drunkenness: C. C. Art. 336 *b*. The contract of a lunatic or drunken man, who by reason of lunacy or drunkenness, is not capable of understanding its terms or forming a rational judgment of its effect on his interest, is not void, but only voidable at his option, and this only if his state is known to the other party: Pollock on Contracts, p. 91. See Robertson v. Kelly, 2 O. R. 163 (1883).

3. Married Women.—The law of Quebec differs in this respect from that of the other provinces. The general rule there is that a wife cannot contract without the authorization of her husband. If she is separate as to property by marriage contract she may administer her own property: C. C. Art. 1422; or if she be granted by the Court a separation from bed and board: Art. 210; or even a separation as to property only: Art. 177. If she is a public trader she may bind herself without the authorization of her husband for all that relates to her commerce: Art. 179. A wife cannot bind her separate property in any contract with or for her husband: Art. 1301. So that if a wife gives a note or accepts a bill for her husband's debt, or indorses her husband's bill or note, it is a nullity; and the highest Court of the province has held that this, being a matter of public policy, makes the instrument void, even in the hands of a bona fide holder for value before maturity.

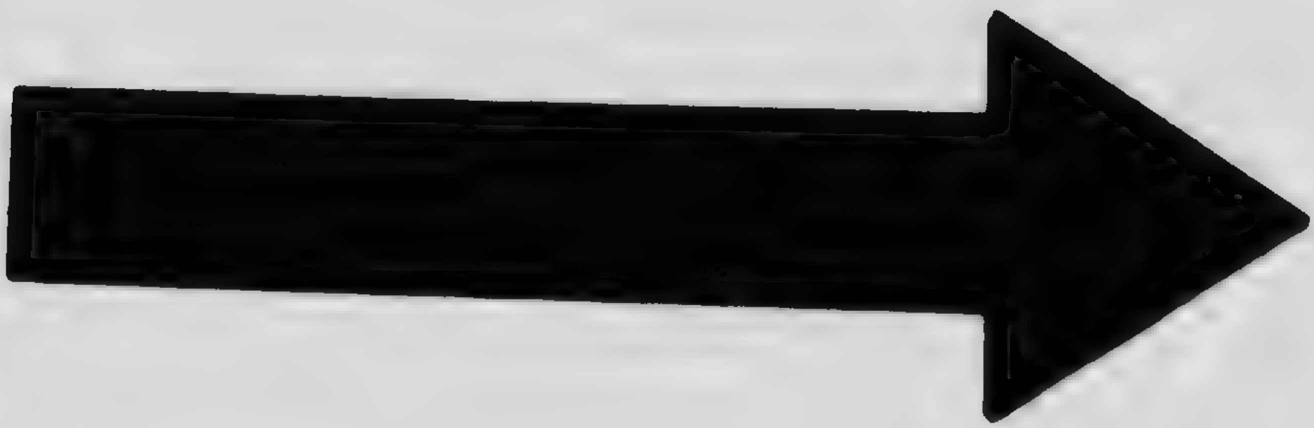
In the other provinces the original rule was that of the common law. "Without authority from her husband, a wife cannot at the common law charge either him or herself by making, drawing, accepting, or indorsing negotiable instruments": Byles, p. 71. In those provinces which have adopted the principle of the English Married Women's Property Act, 1882, the stringency of the common law rule is somewhat relaxed, and a married woman having separate property may by bill, note, or otherwise, bind the separate property which she may afterwards acquire, in all respects as if she were feme sole. See "The Married Women's Property Act." R. S. O. c. 163; R. S. N. S. c. 112; R. S. Man. c. 106, N. W. Territories Act, R. S. C. c. 50; Cons. Ord. N. W. T. c. 47; 44 V. c. 12, P. E. I.; R. S. B. C. c. 130. § 22.

ILLUSTRATIONS.

1. A promissory note made by a married woman for a debt of her husband is not binding on her personally either at common law or under the statutes. Where a married woman who has separate property contracts a debt, she is deemed in equity to have contracted it with reference to her separate property, and if she had power to dispose of that property, equity will make it liable for the payment of the debt: Lawson v. Laidlaw, 3 Ont. A. R. 77 (1878). See also Merchants' Bank v. Bell, 29 Grant, 413 (1881). These cases were prior to the passing of the Ontario Married Women's Property Act, 47 V. c. 19.

2. An infant gave his note for value and got it indorsed by his father, who was of unsound mind, and who got no value for it. The holder was not aware of the condition of the father. Held, that the father's estate was not liable: Re James, 9 Ont. P. R. 88 (1881).

3. Defendant, a married woman, indorsed certain notes held by plaintiff and wrote him a letter that she had $33,000 worth of land in her own name and right. There was no evidence given at the trial as to when she was married or as to how the property was held for her. Held, that there was not sufficient evidence to entitle the plaintiff to a judgment against her: Moore v. Jackson, 16 Ont. A. R. 431 (1889). In a subsequent action founded on the same transaction further proof was made, and it was held by the Supreme Court that plaintiff was entitled to judgment against her and to execution against her separate property: Moore v. Jackson, 22 S. C. Can. 210 (1893). See Palliser v. Gurney, 19 Q. B. D. 519 (1887).



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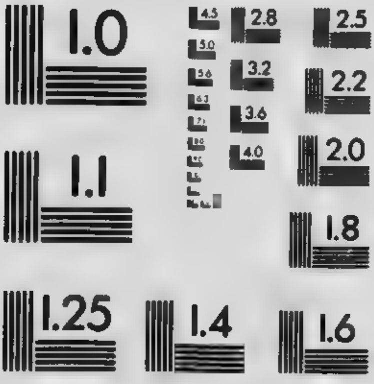

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Capacity of parties.

4. A promissory note signed by a wife, separate as to property, is null, unless authorized by her husband: Guay v. Peltier, 2 Rev. de Leg. 437 (1812); Badeau v. Brault, 1 L. C. J. 171 (1857), overruling Rivet v. Leonard, 1 L. C. J. 172 (1848); Danziger v. Ritchie, 8 L. C. J. 103 (1864).

5. A wife is not liable on a note made by her jointly with her husband where she received no value: Shearer v. Compain, 5 L. C. J. 47 (1860). Nor where value was received by the community: Daigneault v. Wells, 8 R. J. 489 (1902).

6. A husband and wife are both liable on a note given for business in which they are jointly interested: Girouard v. Lachapelle, 7 L. C. J. 289 (1863).

7. A note made by a wife, separate as to property, in favor of her husband, and indorsed by him for necessaries purchased by her, is binding on her: Cholet v. Duplessis, 6 L. C. J. 81 (1862).

8. A note made by a wife, who is a public trader, for her business is binding on her, although not authorized by her husband: Beaubien v. Husson, 12 L. C. R. 47 (1862).

9. Where a minor simply pleaded his minority to an action on a note given by him, held that he should have pleaded lesion and asked to be relieved to the extent to which he was not benefited: Cartier v. Pelletier, 1 R. L. 46 (1868); Boucher v. Girard, 20 L. C. J. 134 (1875).

10. A note made by a minor engaged in trade in connection with his business is binding on him: City Bank v. Lafleur, 20 L. C. J. 131 (1875); but a note signed and made payable in Montreal, by an Ontario trader who is a minor, is null, the law of Ontario governing as to his capacity: Jones v. Dickinson, Q. R. 7 S. C. 313 (1895).

11. A wife separate as to property is not liable on a note given or indorsed for a debt of her husband: Scantlin v. St. Pierre, 10 R. L. 52 (1879); Martin v. Guyot, M. L. R. 1 S. C. 181 (1885); Thibaudeau v. Burke, 20 R. L. 85 (1890).

12. The authorization of a married woman to make a promissory note is sufficiently proved by the indorsement of her husband Johnston v. Scott, 3 L. N. 171 (1880).

13. The indorsement by a wife, separate as to property, of her husband's note given for goods sold and delivered and charged to him is null, although such goods may have contributed to her support: Bruneau v. Barnes, 25 L. C. J. 245 (1880).

14. A promissory note, made by a wife separate as to property, jointly and severally with her husband, is null and of no effect as regards the wife, such an obligation being prohibited by the terms of Art. 1301, C. C.: Chapdelaine v. Vallee, M. L. R. 3 S. C. 380 (1886); Leclerc v. Ouimet, 19 R. L. 78 (1890).

15. A note signed by a wife for the benefit of her husband, and for which she receives no value, is null; and this nullity being a matter of public policy, may be invoked even against a holder in due course: Ricard v. Banque Nationale, Q. R. 3 Q. B. 161 (1893); Maclean v. O'Brien, Q. R. 12 S. C. 110 (1896); overruling Kearney v. Gervais, Q. R. 3 S. C. 496 (1893). See Banque Nationale v. Guy, M. L. R. 7 S. C. 144 (1891).

16. A husband had a power of attorney to manage his wife's business. He indorsed a note in her name to accommodate a friend without authority. The wife made an assignment and included this note among her liabilities. The husband was not a party to the assignment. Held, that the ratification was null, and her estate was not liable: Paquin v. Dawson, Q. R. 4 Q. B. 72 (1894). See also La Banque Ville Marie v. Mayrand, Q. R. 10 S. C. 460 (1896).

17. A minor, 20 years of age, gave a note in payment of a premium of life insurance on his own life. Being sued after he became of age, he was held liable as he did not prove lesion: Manufacturers Life Ins. Co. v. King, Q. R. 9 S. C. 236 (1896).

18. A person is liable on a note given by him during infancy, if, after coming of age, he promises to pay it: Fisher v. Jewett, 2 N. B. (Berton) 69 (1835).

19. A married woman is not liable on a note given by her during her coverture: Sinclair v. Wakefield, 13 N. S. (1 R. & G.) 465 (1880).

20. Complete drunkenness, so that the party did not know what he was doing, held to be a good defence by an indorser against an indorsee who took with notice: Gore v. Gibson, 13 M. & W. 623 (1845).

21. An infant 20 years and 9 months old accepts a bill payable in six months. He ratifies the transaction on attaining his majority and the bill is negotiated. He is not liable on the bill: Ex parte Kibble, L. R. 10 Ch. 373 (1875); 37 & 38 V. c. 62 (Imp.).

22. A person after coming of age accepts a bill for a debt contracted by him during his infancy. He is liable to a holder in due course: Belfast Banking Co. v. Doherty, 4 Ir. L. R. Q. B. D. 124 (1879).

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23. An infant trader cannot be adjudicated a bankrupt for debts contracted for trading purposes: Ex parte Jones, 18 Ch. D. 109 (1881).

24. A lunatic, while sane, gave a note for a very large sum for a merely moral obligation. Held, that the payee was not entitled to rank on the lunatic's estate for the amount of the note: In re Whitaker, 42 Ch. D. 119 (1889).

25. An infant cannot bind himself by the acceptance of a bill of exchange, even when it is given for necessaries supplied him. Such an acceptance is wholly void: Re Soltykoff, Ex parte Margrett, [1891] 1 Q. B. 413.

26. It is not enough that defendant show that he was insane when he gave the note sued on: he must also show that the person to whom he gave it knew that he was insane: Imperial Loan Co. v. Stone, [1892] 1 Q. B. 599.

4. Corporations.—Some corporations are given special authority to become parties to notes and bills by their charters, or by the general laws by which they are governed. In the case of others it is implied from the nature of their objects. "The rights which a corporation may exercise, besides those specially conferred by its title, or by the general laws applicable to its particular kind, are all those which are necessary to attain the object of its creation; thus it may acquire, alienate, and possess property, sue and be sued, contract, incur obligations, and bind others in its favor": C. C. Art. 358. Formerly the right to become parties to bills and notes was almost restricted to commercial corporations; the modern tendency is to extend it to corporations generally.

Dominion charters

As to companies incorporated by special Act of the Dominion Parliament or by letters patent from the Governor in Council, it is provided that, "Every contract, agreement, engagement or bargain made, and every bill of exchange drawn, accepted or indorsed, and every promissory note and cheque made, drawn or indorsed on behalf of the company by any agent, officer or servant of the company, in general accordance with his powers as such under the by-laws of the company, shall be binding upon the company; and in no case shall it be necessary to have the seal of the company affixed

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to any such contract, agreement, engagement, bargain, bill of exchange, promissory note or cheque, or to prove that the same was made, drawn, accepted or indorsed, as the case may be, in pursuance of any by-law or special vote or order, and the person so acting as agent, officer or servant of the company, shall not be thereby subjected individually to any liability whatsoever to any third person therefor: Provided, always, that nothing in this Act shall be construed to authorize the company to issue any note payable to the bearer thereof, or any promissory note intended to be circulated as money, or as the note of a bank, or to engage in the business of banking or insurance": R. S. C. c. 118, s. 35; c. 119, s. 76.

Word "limited."

It is further provided with reference to companies incorporated by Dominion letters patent that every director, manager or officer of the company, and every person on its behalf who signs or authorizes to be signed on behalf of the company, any bill of exchange, promissory note, indorsement or cheque wherein its name with the word "limited" after it does not appear in legible characters, shall incur a penalty of $200, and shall also be personally liable to the holder of any such bill of exchange, promissory note or cheque for the amount thereof unless the same is duly paid by the company: R. S. C. c. 119, s. 79. In the case of companies incorporated by special Act and subject to the general Act, "The directors of the company shall be jointly and severally liable upon every written contract or undertaking of the company, on the face whereof the word 'limited,' or the words 'limited liability' are not distinctly written or printed after the name of the company, where it first occurs in such contract or undertaking": R. S. C. c. 118, s. 39.

Provincial charters.

The provisions of the general Acts of most of the provinces regarding companies incorporated by special Act or Provincial Letters Patent regarding the making, accepting and indorsing of bills, notes and cheques, are similar to those of R. S. C. c. 118, s. 35, and c. 119, s. 76, above quoted. See R. S. O. c. 191, s. 81; R. S. Q. Arts. 4689 and 4746; R. S. N. S. c. 128, s. 88; 56 Vict. c. 7, s. 72 (N. B.); R. S. Man.

§ 22. Corporations.

c. 30, s. 64; Cons. Ord. N.-W. T. c. 61, s. 79; R. S. B. C. c. 44, ss. 26 and 27.

The Ontario Companies Act, R. S. O. c. 191, s. 23, provides that the word "Limited" shall appear at the end of the company's name in its signatuure to any bill, note or cheque, and the company and every officer or employee making default is liable for $10 for every offence. If the word "company," club," "association" or other equivalent word forms part of the company's corporate name, the word "limited" need not appear in full, but an abbreviation thereof, of which the letters "l" and "d" shall be the first and last letters, shall be sufficient.

The Nova Scotia Companies Act, R. S. N. S. c. 128, ss. 73 and 74, requires the word "limited" or some contraction thereof at the end of the signature of a company to any bill, note or cheque under a penalty of $250 and the personal liability of the person offending.

The British Columbia Act, R. S. B. C. c. 44, ss. 86 and 87, contains a like provision. Also the N.-W. Territories Act, Cons. Ord. c. 61, s. 81, the penalty being $200.

In England, where the power to issue bills and notes is not expressly given, it has been laid down that it will be implied only when the corporation without it cannot carry on its business, or attain the end for which it was created, and that it cannot be implied from the power to contract debts, since the power to issue commercial or negotiable paper involves something more than the contracting of a debt, namely the imposition upon the corporation of the liability to innocent indorsers for debts, which the corporation is not authorized to contract. See Bateman v. Mid-Wales Ry. Co., L. R. 1 C. P. 499 (1866). It has also been held that this implied power is not possessed by a water works company: Neale v. Turton, 4 Bing. 149 (1827); Broughton v. Manchester Water Works, 3 B. & Ald. 1 (1819); or by mining companies: Dickinson v. Valpy, 10 B. & C. 128 (1829); Brown v. Byers, 16 M. & W. 252 (1847); Bult v. Morrell, 12 A. & E. 745 (1840); by a salvage company:

Thompson v. Universal Salvage Co., 1 Ex. 694 (1848); by a gas company: Bramah v. Roberts, 3 Bing. N. C. 963 (1837); or by a cemetery company: Steele v. Harmer, 14 M. & W. 831 (1845). The tendency of recent decisions, however, is towards a more liberal interpretation of these powers: Re Peruvian Railways Co., L. R. 2 Ch. 617 (1867). § 22. Corporations.

In the United States, the Courts have laid down the broad rule, that whenever a corporation can contract a debt for a certain object, it may give a negotiable note, or accept a bill of exchange for the amount: 1 Daniel, §§ 381-3.

ILLUSTRATIONS.

1. Under the Act, 7 Vic. c. 16, the K. M. R. Co. incorporated for repairing vessels, etc., may give and receive notes in the course of its business: Kingston Marine R. Co. v. Gunn, 3 U. C. Q. B. 368 (1846).

2. The Buffalo B. & G. Ry. Co. have no power under their charter or under the General Railway Clauses Consolidation Act to make promissory notes: Topping v. Buffalo B. & G. Ry. Co., 6 U. C. C. P. 141 (1856).

3. A manufacturing company will be presumed to be a trading corporation and capable in law of making a promissory note: Farrell v. Oshawa Manufacturing Co., 9 U. C. C. P. 239 (1859).

4. Debentures or coupons cannot be considered promissory notes when the company which issues them has no authority to make notes: Geddes v. Toronto Street Railway Co., 14 U. C. C. P. 513 (1864).

5. A building society, incorporated under C. S. U. C. c. 53, may make promissory notes: Snarr v. Toronto Permanent Building and Savings Society, 29 U. C. Q. B. 317 (1869).

6. The defendants desiring to raise money drew a bill and requested plaintiffs to indorse it for their accommodation, which plaintiffs did. Defendants got it discounted, but failed to meet it and the plaintiffs had to pay it. Held, that, assuming defendants had no power to draw the bill, they were nevertheless liable to plaintiffs as for money paid for them: Brockville and Ottawa Ry. Co. v. Canada Central Ry. Co., 41 U. C. Q. B. 431 (1877).

7. Where the holders of a note sued the president of a club personally on a note of the club signed by him as president, on the ground among others that the club had no power to make notes, it was held that this was a matter of law known to plaintiffs as

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well as defendant, and they had accepted it as a note of the club, which had never repudiated liability: Bank of Ottawa v. Harrington, 28 U. C. C. P. 488 (1878).

8. S., who was the president and treasurer of a company kept the company's account with a banker in his own name as president He made a note in the company's name without authority, which the banker discounted, placing the proceeds to the company's credit The president paid the money out to creditors of the company whom he should previously have paid with moneys which he had misappropriated. The banker, being in good faith, was held entitled to charge up the note to the company's account: Bridgewater Cheese F. Co. v. Murphy, 23 Ont. A. R. 66 (1896). Affirmed 26 S. C. Can. 443 (1896).

9. Municipal corporations have not the right to make notes or accept bills: Pacaud v. Halifax South, 17 L. C. R. 56 (1866); Martin v. City of Hull, 10 R. L. 232 (1878).

10. A promissory note of a municipal corporation held good Ledoux v. The Municipality of Mile End, 2 L. N. 37 (1878).

11. A municipal corporation will be condemned to pay the amount of a promissory note signed by the mayor and secretary-treasurer in the name of the corporation, where it is not proved that the note was given without consideration: Corporation of Grantham v. Couture, 24 L. C. J. 105 (1879): Ville d'Iberville v. Banque du Peuple, Q. R. 4 Q. B. 268 (1895).

12. Where the by-laws of a company require notes to be signed by the president and vice-president, and countersigned by the treasurer, a note payable to the order of the company indorsed by the vice-president alone and delivered to a creditor for a private debt is not binding on the company: Mechanics' Bank v. Bramley, 25 L. C. J. 256 (1879).

13. A building society not specially authorized to make notes held liable to an indorsee for value: Société de Construction du Canada v. La Banque Nationale, 3 L. N. 130; 24 L. C. J. 226 (1880).

14. The by-laws of a mutual assurance company gave the president the management of its affairs, and it was his duty to sign all notes authorized by the board or by the by-laws. He gave a note in the name of the company in settlement of a loss The company was held liable to a holder in due course: Jones v. Eastern Townships Mutual Fire Ins. Co., M. L. R. 3 S. C. 413 (1887).

15. The chairman and secretary-treasurer of a board of school commissioners have no right to give a note for a debt of the board without special authorization: Letellier v. School Commissioners of Ouiatchouan, 16 R. L. 449 (1888).

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16. The making or indorsing of a promissory note on behalf of a charitable corporation where liability is incurred is not an act of mere administration, and must be either authorized or ratified by the governing body to bind the corporation: Banque Jacques Cartier v. Les Religieuses Soeurs, Q. R. 1 Q. B. 215 (1892).

17. Authority to the secretary-treasurer of a company to accept bills drawn on the company, does not authorize him to indorse accommodation bills: Union Bank v. Eureka Woollen Mfg. Co., 33 N. S. 302 (1900).

18. The managing director of a company gave promissory notes of the company in connection with its business. There was no by-law defining his powers, but similar notes had been paid without objection by the other directors or the auditor. The company was held liable: Imperial Bank v. Farmers' Trading Co., 13 Man. R. 412 (1901).

Drawing or indorsing by person not competent

2. Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsing entitles the holder to receive payment of the bill, and to enforce it against any other party thereto. Imp. Act, s. 20 (2).

It is not necessary to the validity of a bill that the drawer or indorsers should be liable. The drawer or any indorser may insert an express stipulation negativing his liability to the holder: section 16. As to estoppel of the drawer, acceptor, or indorser of a bill as to certain other parties to the bill, see sections 54 and 55.

Married women.

It is to be observed that a married woman is not included in the list of incompetent persons who may become parties to a bill and render others liable thereon without incurring liability themselves. The clause is taken without change from the Imperial Act, and in England she is now practically in the same position as if unmarried. In Quebec, if not separate as to property, she could not validly pass the property in a bill payable to her order, without authorization of her husband, except as against an acceptor, drawer or indorser, who is precluded from denying it under sections 54 and 55. See C. C. Art. 177.

§ 23.

ILLUSTRATIONS.

1. The holder of a note, payable to a certain society or bearer, may recover from the maker, even although the society has no power to endorse or transfer notes: Hammond v. Small, 16 U. C. Q. B. 371 (1858).

2. A husband, who made a note payable to the order of his wife is liable to her indorsee: McIver v. Dennison, 18 U. C. Q. B. 619 (1859).

3. An indorser pour aval cannot set up as a defence that the note is null because the maker, a married woman, was not authorized by her husband: Norris v. Condon, 14 Q. L. R. 184 (1888).

4. In an action against an acceptor by an indorsee, it is no defence that the drawers and payees were infants: Taylor v. Croker, 4 Esp. 187 (1803).

5. The infancy of the payee is no answer in an action by the indorsee against the drawer: Grey v. Cooper, 3 Douglas 65 (1782); Lebel v. Tucker, 8 B. & S. 833 (1867); Nightingale v. Withington, 15 Mass. 272 (1818).

Signature essential to liability

23. No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such: Provided that—

Exceptions.

(*a*) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name;

(*b*) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm. Imp. Act, s. 23.

The first part of this section should be read in connection with section 56, which provides that when a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liability of an indorser to a holder in due course, and is subject to all the provisions of the Act respecting indorsers. The same rule would apply to the maker and indorsers of a promissory note: section 88. It probably represents correctly

the former law in England, and also in the provinces other than Quebec, where an aval would be an exception. For a consideration of this point see the notes on section 56. § 23.

If an agent becomes a party to a bill in his own name, his undisclosed principal cannot be made liable on the bill: Beckham v. Drake 9 M. & W. 92 (1841); Re Adansonia Co., 43 L. J. Ch. p. 431 (1874). As between the immediate parties he may nevertheless be liable on the consideration.

"Person" defined.

"Person" here includes any body corporate and politic, or party, and the heirs, executors, administrators or other legal representatives of such person: R. S. C. c. 1, s. 7 (22). It is not necessary that the person charged should have signed with his own hand, it is sufficient if his name be signed by some other person by or under his authority: section 90; and in the case of a corporation that it be executed by the proper officers, or under the corporate seal, although the Act does not require the bill or note of a corporation to be under seal.

As to the personal liability of officers of corporations who purport to draw, indorse or accept on behalf of the corporation, see notes on section 26.

As to what is a sufficient signature to a bill see the note on section 3, p. 36.

With regard to promissory notes executed before a notary in the Province of Quebec, and which are not signed by the makers, see note on section 82.

ILLUSTRATIONS.

1. A. made a note payable to B. or order, and C. wrote his name on the back, but B. did not indorse. Held that C. could not be held liable as a new maker: Steer v. Adams, 6 U. C. O. S. 60 (1839); Jones v. Ashcroft, 6 U. C. O. S. 154 (1841).

2. A party indorsing his name on the back of a note not negotiable, or if negotiable not indorsed by the payee to whose order it is made, is not responsi[illegible] to the payee as maker, indorser or guarantor: West v. Bown, 3 U. C. Q. B. 290 (1847); Chew v. Adams, ibid., 291 (1838); Wilcocks v. Tinning, 7 U. C. Q. B. 372 (1850).

3. A. made a note payable to B. or bearer. D. indorsed it, and was held liable to B. as holder of the note: Vanleuven v. Vandusen, 7 U. C. Q. B. 176 (1849).

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Irregular signatures.

4. A husband is not liable on a note made by his wife in her own name, although she was acting as his agent in the transaction: Ross v. Codd, 7 U. C. Q. B. 64 (1849).

5. Defendant indorsed in blank as security for the maker a promissory note, payable to plaintiff, but not negotiable. Held, that defendant was not liable as a maker: McMurray v. Talbot, 5 U. C. C. P. 157 (1855).

6. W. made a non-negotiable note to plaintiff for money lent, and defendants indorsed as sureties for W. One of them paid interest and both promised to pay. Held, that they were not liable as indorsers or on an account stated: Skilbeck v. Porter, 14 U. C. Q. B. 430 (1856).

7. Where a non-negotiable promissory note given for money lent to a firm, was signed by one partner and indorsed by the other, the latter was under the particular facts of the case held to have signed as guarantor: McPhee v. McPhee, 19 O. R. 603 (1890). Overruled by Robertson v. Lonsdale, 21 O. R. 600 (1892).

8. Where a promissory note was drawn payable to the order of the maker, and he did not indorse it, the indorsers were held not liable as indorsers pour aval or otherwise, the instrument not being a promissory note under Arts. 2344 and 2345, C. C.: Trenholme v. Coutu, Q. R. 2 Q. B. 387 (1893).

9. Where three persons indorsed a note which was not indorsed by the payees to whose order it was made, they were held not liable as makers: Morton v. Campbell, 4 N. S. (Cochran) 5 (1850).

10. A person who had put his name on the back of a note before its delivery to the payees, held not liable to them as an indorser: Burns v. Snow, 9 N. S. (3 G. & O.) 530 (1875).

11. A note payable to P. was indorsed by G. lengthwise on the note, and then by P. G. was held liable as an indorser: McLean v. Garnier, 14 N. S. (2 R. & G.) 432 (1881).

12. A husband is not liable on the ground of ratification or otherwise on a bill drawn upon and accepted by his wife in her own name although the business was really his: Craig v. Matheson, 32 N. S. 452 (1900).

13. Y. signed a non-negotiable note, and H., who agreed to join him in it, wrote his name on the back, saying it was "a joint note or better than a joint note." Held, that H. was liable as maker: Piers v. Hall, 18 N. B. (2 P. & B.) 34 (1878).

14. Where A. puts his name on the back of a promissory note payable to B. or order, before it is delivered to the payee to take effect § 23.
as a promissory note, he is liable as maker: Bell v. Moffat, 20 N. B. (4 P. & B.) 121 (1880).

15. D., the holder of a bill indorsed in blank, converts the last indorsement into a special indorsement in favour of a person to whom he transfers the bill. D. is not liable as an indorser: Vincent v. Horlock, 1 Camp. 442 (1808).

16. A clerk draws a bill in the name of a firm whose business he is winding up, two of the partners being dead. He is not liable on the bill: Wilson v. Barthrop, 2 M. & W. 863 (1837).

17. A. draws a bill, signing it "J. A., agent." A. alone is liable as agent, his principal is not: Pentz v. Stanton, 10 Wend. 271 (1833).

18. The principal is not liable on a note on which his name does not appear, even if the payee knew that the note was given on his account: Robinson v. Kanawha Bank, 44 Ohio St. 447 (1886).

Assumed Name.—A person may adopt whatever name he pleases in his business dealings, unless there be some special reason against his using that particular name; and in such a case the adopted name is in law equivalent to his actual name. Thus an individual may carry on business in a firm name, or a husband in the name of his wife, or a principal in the name of an agent, or a corporation may use a firm name or that of its agents, etc.

ILLUSTRATIONS.

1. A bill drawn and indorsed by a wife in her own name in the presence of her husband and under his direction was treated as the bill of the husband: Prestwick v. Marshall, 7 Bing. 565 (1831).

2. A bill drawn on William Bradwell was accepted by his wife Mary Bradwell in her own name. The husband recognized his liability and promised to pay. Held, that he was liable as acceptor: Lindus v. Bradwell, 5 C. B. 583 (1848). See also Ross v. Codd, 7 U. C. Q. B. at p. 74 (1850); and Trueman v. Loder, 11 A. & E. at p. 594 (1840).

3. Where one partner of an English firm did business for the firm in America in his own individual name, the firm was held liable on indorsements by him: South Carolina Bank v. Case, 8 B. & C. 427 (1828).

§ 23. 4. The "Boston Iron Company" was held liable on notes signed "Horace Gray & Co.": Melledge v. Boston Iron Co., 5 Cush. 158 (1849).

Firm Signature.—The signature of a firm is deemed to be the signature of all those who are partners in the firm, whether working, dormant or secret, or who, by holding themselves out as partners, are liable as such to third parties: Pooley v. Driver, 5 Ch. D. 458 (1876); Gurney v. Evans, 27 L. J. Ex. 166 (1858).

A bill addressed to a partner may be accepted by the firm, and the partner made liable as acceptor on the principle contained in this clause: section 17. The partners are presumed to have given each other authority to do the business of the firm, and what is done by one binds the others, not only ordinary partners but also dormant or secret partners. And in trading or commercial partnerships each partner will be presumed to have authority to sign the firm name as drawer, acceptor, maker or indorser to commercial paper for the business of the firm. If a partner sign the firm name on his private business, the firm is not liable except to a holder in due course: Bank of Australasia v. Breillat, 6 Moore P. C. 152 (1847); Wiseman v. Easton, 8 L. T. N. S. 637 (1863).

In civil or non-trading partnerships there is no such presumption, and the partner signing the firm name may make only himself liable: Dickinson v. Valpy, 10 B. & C. 137 (1829); Thicknesse v. Bromilow, 2 Cr. & J. 425 (1832); Ricketts v. Bennett, 4 C. B. 699 (1847); Garland v. Jacomb, L. R. 8 Ex. 219 (1873). But the others may become liable by estoppel or ratification: section 24.

ILLUSTRATIONS.

1. Where the drawing or accepting of bills is not a necessary part of the business of a firm, the fact that bills were drawn and accepted with defendant's knowledge while he was partner is sufficient to render him liable: Lee v. McDonald, 6 U. C. O. S. 130 (1841).

2. Where the plaintiff knowingly received a note indorsed for the accommodation of the maker by one partner without the co-partner's authority or knowledge, the latter is not liable: Harris v. McLeod, 14

U. C. Q. B. 164 (1856); Royal Canadian Bank v. Wilson, 24 U. C. C. P. 362 (1874). § 23.

3. A holder who received in good faith before maturity a note indorsed in the name of a commercial firm by one partner, is entitled to recover against the firm although the co-partner did not authorize the indorsement which was for the accommodation of the maker: Henderson v. Carveth, 16 U. C. Q. B. 324 (1858).

4. Where a firm of two or more indorse in the partnership name, the liability as sureties is a joint liability, and not the several liability of each partner: Clipperton v. Spettigue, 15 Grant, Chy. 269 (1868).

5. A draft was made on a firm and a partner marked it "good" adding his own initials. Held, that the firm was not liable: Hovey v. Cassels, 30 U. C. C. P. 230 (1879).

6. Where a solicitor signed his firm's name to an accommodation note without the authority or knowledge of his co-partner, the latter is not liable, even to a holder in due course: Wilson v. Brown, 6 Ont. A. R. 411 (1881).

7. Plaintiffs discounted a note for the maker, payable to and indorsed in a firm name by one of the partners, plaintiffs knowing that it was so indorsed as security for the maker, and having no reason to suppose it was in connection with the partnership business. Held, that the other partners were not liable: Federal Bank v. Northwood, 7 O. R. 389 (1884).

8. Where a person held out to be a partner gave a note in the name of the firm for money borrowed, and which was to be kept secret from the other partners, the lender cannot recover from the other members of the firm: McConnell v. Wilkins, 13 Ont. A. R. 438 (1885).

9. Where plaintiff took a note which had been fraudulently signed by a partner in the firm name after dissolution, but before being advert sed, and plaintiff knew nothing of the firm or its members, held, that the other partner was not liable: Standard Bank v. Dunham, 14 O. R. 67 (1887).

10. A note made fraudulently by a partner in the firm name binds the partnership in the hands of a bona fide holder for value: Walter v. Molsons Bank, Ramsay A. C. 80 (1877).

11. Where by the deed of dissolution of a partnership, one partner was given authority to sign notes in the firm's name, and another partner, when sued on such a note, pleaded that it was given without his knowledge in the name of a terminated co-partnership, he was held liable: White v. Wells, 1 L. N. 87 (1878).

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12. A partner made notes in the firm's name, forged the name of the payee, got the notes discounted at the bank, and applied a large part of the proceeds to partnership purposes. Held, that the bank could not rank on the insolvent estate of the firm on the notes, but could for the amount of them as for money paid: Re Graham, 12 N. S. (3 R. & C.) 251 (1878).

13. A person who was a member in two firms made a note in the name of one, without the knowledge of his partner in that firm, to raise money for the other. The bank which discounted the note was aware of the facts. Held, that the partner who was ignorant of the making was not liable to the bank: Creighton v. Halifax Banking Co., 18 S. C. Can. 140 (1890).

14. In an action by a bona fide holder against a firm as indorsers of a note, it is no defence that it was indorsed fraudulently by one of the firm, and for matters not relating to the business of the partnership: McLeod v. Carman, 12 N. B. (1 Han.) 592 (1869).

15. Where a party takes a note made or indorsed in a firm's name, knowing that it was not for the purposes of the partnership, the onus is on him to prove the knowledge or assent of each partner: Union Bank v. Bulmer, 2 Man. 380 (1885).

16. Where a bill is drawn on M. & McQ. for goods supplied to M., McQ. & Co., and accepted in the name of M. & McQ. by the manager of M., McQ. & Co., the latter are not liable as acceptors of the bill: Quebec Bank v. Miller, 3 Man. 17 (1885).

17. Where a bill is payable to the order of a firm and the partnership is subsequently dissolved, the indorsement of an ex-partner of the late firm transfers the property therein, and authorizes the payment thereof: King v. Smith, 4 C. & P. 108 (1829); Lewis v. Reilly, 1 Q. B. 349 (1841). Contra, 1 Daniel, § 370a, and cases there cited.

18. Where a member of a firm in fraud of his partner accepts a bill in a name which is not the regular firm name but resembles it, the latter is not liable: Faith v. Richmond, 11 A. & E. 339 (1840); Kirk v. Blurton, 9 M. & W. 284 (1841); Royal Canadian Bank v. Wilson, 24 U. C. C. P. 32 (1874).

19. A person carries on business in his own name, but has a dormant partner. He accepts a bill in the common name on his private account. If the dormant partner can show that the bill is not a firm bill, he is not liable: Yorkshire Banking Co. v. Beatson, 5 C. P. D. 109 (1880).

24. Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority : § 24. Forged or unauthorized signature.

Provided, that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery : And provided also, that if a cheque, payable to order, is paid by the drawee upon a forged indorsement out of the funds of the drawer, or is so paid and charged to his account, the drawer shall have no right of action againt the drawee for the recovery back of the amount so paid, or no defence to any claim made by the drawee for the amount so paid as the case may be, unless he gives notice in writing of such forgery to the drawee within one year after he has acquired notice of such forgery ; and in case of failure by the drawer to give such notice within the said period, such cheque shall be held to have been paid in due course as respects every other party thereto or named therein, who has not previously instituted proceedings for the protection of his rights. Imp. Act, s. 24. Proviso. Payment on forged indorsement.

2. If a bill bearing a forged or unauthorized indorsement is paid in good faith and in the ordinary course of business, by or on behalf of the drawee Right of recovery by person paying on forged indorsement.

§ 24. or acceptor, the person by whom or on whose behalf such payment is made, shall have the right to recover the amount so paid from the person to whom it was so paid or from any indorser who has indorsed the bill subsequently to the forged or unauthorized indorsement, provided that notice of the indorsement being a forged or unauthorized indorsement is given to each subsequent indorser within the time and in the manner hereinafter mentioned; and any such person or indorser from whom said amount has been recovered shall have the right of recovery against any prior indorser subsequent to the forged or unauthorized indorsement. 60-61 V. c. 10, s. 1.

Time for and mode of notice.

3. The notice of the indorsement being a forged or unauthorized indorsement shall be given within a reasonable time after the person seeking to recover the amount has acquired notice that the indorsement is forged or unauthorized, and may be given in the same manner, and if sent by post may be addressed in the same way, as notice of protest or dishonor of a bill may be given or addressed under this Act. 60-61 V. c. 10, s. 1.

History of section.

The first paragraph of this section and the first proviso are taken from the Imperial Act, and form the whole of section 24 of that Act. The second proviso is in part a substitute for section 60 of the Imperial Act, which protects a banker who pays a cheque or bill payable on demand on which one or more indorsements are forged.

In the bill as introduced into the Canadian Parliament, section 60 was a copy of the same section in the Imperial Act; but after a long discussion it was struck out in the House of Commons as it would have made an important innovation in our law: Commons Debates, 1890, p. 1526. In

the Senate a motion was made to restore it, but this was rejected: Senate Debates, 1890, p. 373. In lieu of section 60, the second proviso of this section was in substance inserted in the Bill in the Senate: Debates p. 464; and the Commons finally accepted it.

By the amending Act of 1891 a second sub-section was added to make it clear that a bank or indorser would have a remedy against indorsers subsequent to the forged indorsement. It was represented to Parliament that this added provision did not accomplish the purpose intended, and in 1897 sub-section 2 was repealed, and sub-sections 2 and 3 as given above were substituted. The phraseology is very cumbrous, and in marked contrast in this respect with the language of the Imperial Act in general.

"Subject to the Provisions of this Act."—These words in the Imperial Act apply especially to section 60 above referred to. The sections in the present Act to which they would appear to apply are 54 and 55 relating to estoppel as to a drawer or acceptor of a bill, and 79 and 81 relating to the payment of crossed cheques by a bank.

"Forged or Unauthorized Signatures."—Forgery is the making of a false document, knowing it to be false, with the intention that it shall in any way be used or acted upon as genuine, to the prejudice of any one, whether within Canada or not, or that some person should be induced, by the belief that it is genuine, to do or refrain from doing anything, whether within Canada or not: Criminal Code, 1892, sec. 422. Signing the name of a non-existing or fictitious person or firm with fraudulent intent is forgery: Reg. v. Rogers, 8 C. & P. 629 (1838).

The following is the section of the Criminal Code, 1892, relating to the forgery of "bills and notes": "423. Every one who commits forgery of the documents hereinafter mentioned is guilty of an indictable offence and liable to the following punishment: (A) To imprisonment for life if the document forged purports to be, or was intended by the

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offender to be understood to be, or to be used as * * * * (r) any bank note or bill of exchange, promissory note or cheque, or any acceptance, indorsement or assignment thereof." The forged instrument must be false in itself. The mere subscribing a cheque, given as a party's own, by a fictitious name, is not forgery: Reg. v. Martin, 5 Q. B. D. 34 (1879).

The present section does not treat of bills forged by being fraudulently altered. For these, see section 63.

A signature that is wholly unauthorized, whether purporting to be by procuration or otherwise, is as ineffectual to convey title to a bill as a forged signature, except as against a party who is precluded or estopped from setting up the forgery or want of authority.

A signature placed on a bill, without being authorized, but not amounting to a forgery, may be ratified.

It has been laid down that a forgery cannot be ratified, and the language of the first proviso of this section would seem by implication to sustain that view. In Brook v. Hook, L. R. 6 Ex. 89 (1871), Chief Baron Kelly, speaking for the majority of the court, says, p. 100: "In all the cases cited for the plaintiff, the act ratified was an act pretended to have been done for or under the authority of the party sought to be charged; and such would have been the case here if Jones had pretended to have had the authority of the defendant to put his name to the note, and that he had signed the note for the defendant accordingly, and had thus induced the plaintiff to take it. In that case, although there had been no previous authority, it would have been competent to the defendant to ratify the act. But here Jones had forged the name of the defendant to the note, and pretended that the signature was that of defendant; and there is no instance to be found in the books of such an act being held to have been ratified by a subsequent ratification or statement. Again, in the cases cited, the act done, though unauthorized at the time, was a civil act, and capable of being made good by a subsequent recognition or declaration; but no authority is to

be found that an act which is in itself a criminal offence is capable of ratification." This view has been adopted by the Court of Appeal in Ontario: Merchants' Bank v. Lucas, 15 Ont. A. R. 573 (1889); and affirmed by the Supreme Court of Canada in the same case: 18 S. C. Can. 704 (1890). See also La Banque Jacques Cartier v. La Banque d' Epargne, 13 App. Cas. (1887) at p. 118; and Vagliano v. Bank of England, [1891] A. C. 130.

In the Scotch case of McKenzie v. The British Linen Co., 6 App. Cas. 82, in the House of Lords, Lord Blackburn said (p. 99) that if a document was uttered under such circumstances of intent to defraud as amounted to forgery, the person whose name was forged could not ratify it so as to make a defence to the forger against a criminal charge. "But," he added, "if the person whose name was used without authority chooses to ratify the act, even though known to be a crime, he makes himself civilly responsible just as if he had originally authorized it." It is to be observed however that it was held that in this case there was no ratification, and the principal question was one of estoppel, which it was also held was not made out.

In Scott v. The Bank of New Brunswick, 23 S. C. Can. 277 (1894), where the signature of the payee of a non-negotiable bank deposit receipt was forged and the money received by the forger, Strong, C. J., discusses the foregoing cases, and holds that Brook v. Hook is no longer law in so far as it states broadly that a forgery cannot be ratified, having been overruled by the McKenzie case. The decision in the Scott case was put upon the ground that the payee of the deposit receipt had ratified the payment by the bank, and that his action was properly dismissed.

The question of estoppel as to forged cheques, and of the proper measure of damages in such a case was discussed in the Privy Council in Ogilvie v. West Australia Mortgage Co., [1896] A. C. 257.

In Dominion Bank v. Ewing, 3 O. W. R. 127 (1904), the Court of Appeal for Ontario affirmed a judgment holding

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defendants liable on a forged note discounted by the bank. While a large part of the proceeds remained in the bank defendants received a notice from the bank advising them of the due date, amount of the note, etc. Instead of replying they communicated with the forger who drew out the remainder of the proceeds. The Court held that it was not a case of ratification, but that by their silence defendants were estopped from denying the signature, and they were condemned to pay the full amount of the note.

In England where a bill is held with a forged signature, the court will restrain its negotiation by injunction, or order it to be given up and cancelled: Esdaile v. La Nauze, 1 Y. & C. 394 (1835).

In the United States it has been held that a forgery may be ratified: Greenfield Bank v. Crafts, 4 Allen, 477 (1862); Union Bank v. Middlebrook, 33 Conn. 95 (1865); Casco Bank v. Keene, 53 Me. 103 (1865); Howard v. Duncan, 3 Lansing (N.Y.) 175 (1870); Bartlett v. Tucker, 104 Mass. 341 (1870); Wellington v. Jackson, 121 Mass. 159 (1876); Bowlin v. Creel, 63 Mo. App. 229. There are however decisions to the contrary: McHugh v. Schuylkill Co., 5 Am. Rep. 445 (1871); Shisler v. Vandike, 92 Penn. St. 449 (1880); Smith v. Tramel, 68 Iowa, 488 (1886); Henry v. Heeb, 114 Ind. 275 (1887).

Estoppel.—In the Imperial Act "precluded" was used instead of "estoppel" when it was determined to extend the Act to Scotland, as the latter word is unknown to Scotch law. A party to a bill, whose signature is unauthorized or even forged, may by his language or conduct have led an innocent holder to take the bill as genuine, and he cannot subsequently repudiate it to such innocent holder. The rule is, that when one by his words or conduct wilfully causes another to believe in the existence of a certain state of things and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time: Pickard v. Sears, 6 A. & E. 469 (1837). See

also Carr v. London & N. W. Ry. Co., L. R. 10 C. P. 307 (1875). § 24.

"**Notice of such Forgery.**"—Where actual notice has been given or received, no question will arise as to when the year for action will expire. The difficulty will arise where notice or knowledge is to be inferred from the circumstances of the case, as for instance the fact of the cheque with the forged indorsement being given up to the drawer.

"**Subject to the Provisions and Limitations.**"—The drawee also must take action against an indorser or a transferrer by delivery within a year, or his security is gone. So also must an indorser who has been compelled to pay under the provisions of this section. No action is here given to a transferrer by delivery who has been obliged to pay, but he would have his recourse against the person from whom he received it, to recover the amount he paid for the bill, sections 55 and 58.

ILLUSTRATIONS.

1. Where defendant's name was signed by a nephew for whom he was in the habit of indorsing on purchases from plaintiffs, and he had acknowledged his liability and asked for time, and only denied his liability after his nephew had absconded. Held, that he had precluded himself from disputing his liability: Pratt v. Drake, 17 U. C. Q. B. 27 (1858).

2. A cheque to the order of a company was cashed by a bank on the indorsation of the secretary. The by-laws required the signature of the president also. The secretary had on previous occasions indorsed in the same way, and the company had not objected. Held, that the bank was not liable to the company: Thorold Manufacturing Co. v. Imperial Bank, 13 O. R. 330 (1887).

3. Defendants separately called at plaintiff's bank and examined a bill to which their firm name had been forged. They both examined it closely, and one of them used words throwing doubts as to its genuineness, and gave an evasive answer as to its payment. The other promised to send a cheque for it the next day. They were held not to be precluded from setting up the defence of forgery: Merchants' Bank v. Lucas, 15 Ont. A. R. 573 (1889); affirmed in the Supreme Court: 18 S. C. Can. 704 (1890). A forged bill or note cannot be ratified: Westloh v. Brown, 43 U. C. Q. B. 402 (1878); Merchants' Bank v. Lucas, supra.

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4. The holder of a promissory note whose title was derived from a forged indorsement, although he acted in entire good faith, cannot recover the amount of the note from any of the previous indorsers: Larue v. Evanturel, 2 L. C. L. J. 112 (1866).

5. When the maker of a note, whose signature was forged, stated before suit that he had signed the note for the accommodation of the indorser and offered to pay if time was given, and the holder in consequence refrained from prosecuting the indorser for forgery; held that the maker was liable and was precluded from setting up the defence of forgery: Union Bank v. Farnsworth, 19 N. S. 82 (1886).

6. Plaintiff, a sea captain, deposited with the defendants $1,000, and took a deposit receipt payable to his order, which he left with R., the managing owner of the vessel, who indorsed plaintiff's name and drew the money. Plaintiff was absent three years, and on his return R. confessed, promised to pay the money and gave a mortgage as security. Plaintiff was again absent two years, and when he returned R. had absconded. The jury gave a verdict for plaintiff, but held on appeal that by withholding from the bank for two years the knowledge he had, plaintiff by his laches was estopped from recovery: Scott v. Bank of New Brunswick, 31 N. B. 21 (1891).

7. Where a note is payable to the order of Henry Davis and is indorsed by another person of the same name it is a forgery and the indorsee cannot recover: Mead v. Young, 4 T. R. 28 (1790); and if he collect on the forged indorsement he is liable to refund: Johnson v. Windle, 3 Bing. N. C. 225 (1836); Robarts v. Tucker, 16 Q. B. 560 (1851); Ogden v. Benas, L. R. 9 C. P. 513 (1874); Carpenter v. Northborough National Bank, 123 Mass. 66 (1877); Ryan v. Bank of Montreal, 14 Ont. A. R. 533 (1887).

8. If a party whose name is forged on a bill acknowledges the signature, and a holder takes it on the strength of this, he is liable: Leach v. Buchanan, 4 Esp. 226 (1803).

9. Where the original indorsement of the payee's name is a forgery, a real indorsement by the payee after the bill has arrived at maturity will not give the holder any title: Esdaile v. La Nauze, 1 Y. & C. 394 (1835).

10. The name of a firm, as drawers and indorsers of a bill, was forged. The acceptor who negotiated is estopped from setting up the defence of forgery to the indorsement as well as to the drawing: Beeman v. Duck, 11 M. & W. 251 (1843).

11. A clerk of the payee of a letter of credit forges the payee's name and gets the money from the bank. The payee can recover the amount from the bank: Orr v. Union Bank, 1 Macqueen H. L. 513 (1854).

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12. A partner in a commercial firm fraudulently accepts a bill in the firm name for his private debt. The firm is estopped from setting up the fraud against a holder for value without notice: Hogg v. Skeen, 18 C. B. N. S. 432 (1865).

13. A partner fraudulently indorses for a private debt a bill payable to the firm. The indorsee collects the money. The partner becomes bankrupt. The other members of the firm and his trustee can recover the money from the indorsee: Heilbut v. Nevill, L. R. 5 C. P. 478 (1870).

14. Defendant in order to prevent the prosecution of one who had forged his name to a note wrote, "I hold myself responsible for a note dated, etc., bearing my signature." The ratification is illegal and he is not liable: Brook v. Hook, L. R. 6 Ex. 89 (1871).

15. Before discounting a bill plaintiff went to the acceptor, and asked him if he had accepted bills for the drawer. He said he had but was not shewn the bills. The jury found for the defendant; the Court refused a new trial, the Judge not saying that he was dissatisfied with the verdict: Levinson v. Young, 1 T. L. R. 571 (1885).

16. When a bill becomes due and is presented for payment, and is paid in good faith, and the money is received in good faith, if such an interval of time has elapsed that the position of the holder may have been altered, the money so paid cannot be recovered from the holder, although indorsements on the bill subsequently prove to be forgeries: London & River Plate Bank v. Bank of Liverpool, [1896] 1 Q. B. 7.

17. Where a person assumes and is known by a name not his own, and a cheque is drawn to his order and delivered to him, the drawer believing him to be another person of the name assumed by him, a holder in due course can recover on the cheque on the ground of estoppel: Robertson v. Coleman, 141 Mass. 231 (1886). Followed in First Nat. Bank v. American Exchange Nat. Bank, 49 App. Div. N. Y. 349 (1899); and Hoffman v. ibid. 96 N. W. Rep. 112 (S. C. Neb. 1901).

25. A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is bound by such signature only if the agent in so signing was acting within the actual limits of his authority. T... ...ct, s. 25. Procuration signatures.

Whenever an authority purports to b... ...rived from a written instrument, or the agent signs the paper with the

§ 25. words "by procuration," in such a case the party dealing with him is bound to take notice that there is a written instrument of procuration, and he ought to call for and examine the instrument itself, to see whether it justifies the act of the agent. Under such circumstances he is chargeable with enquiry as to the extent of the agent's authority; and if without examining into it when he knows of its existence —and especially if he has it in his possession—he ventures to deal with the agent, he acts at his peril and must bear the loss if the agent has transcended his authority: Daniel, § 280.

Where an agent draws, accepts, makes or indorses "per pro.," the taker of such a bill or note is bound to inquire as to the extent of the agent's authority. Where an agent has such authority, the abuse of it does not affect a bona fide holder for value. The apparent authority is the real authority: Bryant v. Quebec Bank, [1893] A. C. 170; Westfield Bank v. Cornen, 37 N. Y. (10 Tiffany) 322 (1867).

Corporation officers. The same rule applies where a bill is signed on behalf of a corporation by its officers or agents. In such a case the statute or by-laws take the place of the power of attorney. As to Dominion and Provincial Joint Stock Companies, see the notes on section 22, ante p. 124.

Agents. An agent or attorney who is not competent to make himself liable on a bill, may nevertheless be able to bind a principal. It may be laid down as a general rule that all persons of sane mind are capable of becoming agents to sign bills. This applies to infants, married women, etc.

As to the personal liability of an agent who transcends his authority or who signs without authority, see the notes on the next section.

Partners. "The mandate and powers of the partners to act for the partnership cease with its dissolution, except for such acts as are a necessary consequence of business already begun": C. C. Art. 1897. The giving of a note or the drawing or accepting a bill in the firm name even for partnership business would not be such an act, but would require special authority from the co-partners: Dolman v. Orchard, 2 C.

& P. 104 (1825); Bank of Montreal v. Page, 98 Ill. 110 (1831) § 25.

ILLUSTRATIONS.

1. A general power of attorney to an agent to sign bills, notes, etc., and to superintend, manage and direct all the affairs of the principal, gives him a power to indorse notes: Auldjo v. McDougall, 3 U. C. O. S. 199 (1833).

2. D. was a clerk or agent keeping a store at L. for defendant, who had sanctioned his purchasing certain goods. Held, that the circumstances gave D. no implied authority to sign defendant's name to a note: Heathfield v. Van Allan, 7 U. C. C. P. 346 (1857).

3. J. M. B. held a power of attorney from the executors of E., authorizing him, among other things, to indorse notes in their names. He indorsed some notes "J. M. B., agent of the executors of E.," and others "the executors late E., per pro. B.," and delivered them to M., an executor, who was financially embarrassed, and who discounted them with plaintiffs on his private account. Held, that the indorsements were sufficient in form, but not within the scope of B.'s power, and the other executor was not liable: Gore Bank v. Crooks, 26 U. C. Q. B. 251 (1867).

4. When the president was authorized by the directors to sign a note in the name of the company, irregularity in the appointment of the directors was not sufficient to destroy such authority, when the company received value and the plaintiff took the note in good faith: Currier v. Ottawa Gas Company, 18 U. C. C. P. 202 (1868).

5. A wife bought her husband's insolvent estate and the business was continued by him, she having given him a power of attorney. Held, that his agency was not limited by the writing, but might be ascertained from any admissible evidence, and she was held for notes given by him not strictly within the written authority: Cooper v. Blacklock, 5 Ont. A. R. 535 (1880).

6. Where an agent fraudulently gave a note, which was, however, within the scope of his authority, the principal was held liable to a bona fide holder for value: Molsons Bank v. Brockville, 31 U. C. C. P. 174 (1880).

7. In the absence of proof to the contrary the secretary of a commercial company will be presumed to have authority to indorse notes payable to the order of the company: Wood v. Shaw, 3 L. C. J. 173 (1858).

8. A non-commercial corporation is not liable on a bill drawn by the manager upon and accepted by the secretary in his capacity as such, which is not authorized by the board: Browning v. British American Friendly Society, 3 L. C. J. 306 (1859).

§ 25.

Procuration.

9. Where a promissory note is signed by procuration, proof of the due execution of such procuration must be made to entitle the plaintiff to recover judgment in an ex parte suit on a note: Ethier v. Thomas, 15 L. C. J. 225; 17 L. C. J. 79 (1870). See also Joseph v. Hutton, 9 L. C. R. 299 (1859).

10. A power of attorney to a husband to administer the affairs of his wife generally, and to mortgage her property, is not an authority to sign her name to a promissory note, and verbal evidence of his right to sign could not be received, his powers being governed by the terms of the written power of attorney: St. Jean v. The Metropolitan Bank, 21 L. C. J. 207 (1876).

11. An agent under a general power of attorney cannot bind his principal by bill or note: Castle v. Baby, 5 L. C. R. 411 (1854); Messier v. Davignon, 3 L. C. L. J. 67 (1867).

12. The president of a company incorporated under the Canada Joint Stock Companies' Act, 1877, will be presumed to have authority, in absence of proof to the contrary, to sign a promissory note on behalf of the company: Brice v. The Morton Dairy Farming Co., 6 L. N. 171 (1883).

13. Where a cheque was payable to the order of "William Almour," the bank was not justified in paying it on the indorsement "William Almour, per A. B. Almour," unless the authority of the latter to indorse were proved: Almour v. La Banque Jacques Cartier, M. L. R. 1 S. C. 142 (1884).

14. The by-laws of a mutual insurance company gave the president "the management of the concern and funds, with power to act in his discretion and judgment in the absence of specific directions from the directors." It was also made his duty "to sign all notes authorized by the board or by virtue of the by-laws." Held, that the company was liable on a note in settlement of a loss, signed by the president: Jones v. E. T. Mutual Fire Ins. Co., M. L. R. 3 S. C. 413 (1887).

15. A power of attorney to draw, accept and indorse bills of exchange, promissory notes, bills of lading, delivery orders, dock warrants, bought and sold notes, contract notes, charter parties, etc., includes the power to make and sign promissory notes, more particularly where the whole tenor of the document shows the intention to confer powers of general agency: Quebec Bank v. Bryant, 17 Q. L. R. 78 (1891); affirmed on appeal, and in the Privy Council, Bryant v. Quebec Bank, [1893] A. C. 179.

16. A power of attorney, whether bestowed by a written instrument or inferred from a train of circumstances, must be construed strictly. The power of attorney in Quebec Bank v. Bryant, supra (15) does not give the agent power to borrow money for the principal:

Banque du Peuple v. Bryant, 17 Q. L. R. 103 (1891); reversed on appeal, but the original judgment was restored in the Privy Council: Bryant v. Banque du Peuple, [1893] A. C. 170. § 25.

17. A wife appointed her husband her general and special attorney, with power to draw for her bills of exchange, promissory notes, etc. Held, that the wife's liability was not limited by Art. 181 C. C. to notes required for the purposes of administration: Banque d'Hochelaga v. Jodoin, [1895] A. C. 612.

18. Where a note is payable to a testator, the indorsement by one of several executors held sufficient: Almon v. Cock, 3 N. S. (2 Thomson) 265 (1847).

19. The agent of a company gave a mortgage note in its name for the balance of the purchase price of land. The company with knowledge of the fact did not repudiate his act, but took possession of the land. Held, that it was estopped from denying its liability on the note: Ryan v. Terminal City Co., 25 N. S. 131 (1893).

20. The power of an agent authorized to draw a bill ceases with the drawing, and if the principal is afterwards relieved, the agent cannot revive his liability: McGhie v. Gilbert, 6 N. B. (1 Allen) 235 (1848).

21. A bill drawn on a merchant was accepted by his clerk, "per pro." The drawee in speaking of the bill some months later said that the drawer should pay it as it was for his benefit. Held, that this was sufficient to leave to the jury the question of whether the clerk's authority had been recognized: Morrison v. Spurr, 8 N. B. (3 Allen) 288 (1856).

22. The indorsee of a note died intestate. His widow who was not administering the estate could not indorse it, even to pay funeral expenses and her husband's debts: Gerow v. Holt, 24 N. B. 412 (1884).

23. B., a member of a firm, gave a power of attorney to accept bills in his name in respect of his private business, to his co-partner S. The latter accepted a bill in respect of partnership business in the name of B. and the bill was negotiated. Held, that B. was not liable: Attwood v. Munnings, 7 B. & C. 278 (1827).

24. A confidential clerk was accustomed to draw cheques for his employers, and in one instance at least was authorized to indorse for them, and in two instances they received money through his indorsing their name. These facts were evidence to go to a jury as to his general authority to indorse: Prescott v. Flynn, 9 Bing. 19 (1832).

25. A power of attorney giving full power to manage certain real estate, followed by general words giving full power to do all the business of the principal, does not authorize the agent to indorse bills in the name of the principal: Esdaile v. La Nauze, 1 Y. & C. 394 (1835).

§ 26.

Procuration.

26. In an action against an acceptor of a bill of exchange, accepted in his name by another person, when evidence had been given of a general authority in that person to accept bills in defendant's name, an admission by defendant of liability on another bill so accepted, is confirmatory of the former: Llewellyn v. Winckworth, 13 M. & W. 598 (1845).

27. The party taking an acceptance or indorsement per procuration cannot hold the principal if the authority given be exceeded: Alexander v. Mackenzie, 6 C. B. 766 (1848); Stagg v. Elliott, 12 C. B. N. S. 373 (1862); North River Bank v. Aymar, 3 Hill 262 (1842).

28. M., a traveller, obtained from a customer of his employers an acceptance in blank, which he signed as drawer and indorser and fraudulently negotiated. It was proved that on a former occasion he had obtained from the customer a blank acceptance which his employers received in payment, and on this occasion he showed the customer a letter that his employers desired to draw upon him. Held, that neither the letter nor the former dealing authorized him to draw the bill: Hogarth v. Wherley, L. R. 10 C. P. 630 (1875).

29. An agent appointed to wind up the business of a firm held not to have authority to accept bills drawn on the firm, or to accept a bill in the name of a partner: Odell v. Cormack, 19 Q. B. D. 223 (1887).

30. Defendants' manager had authority to draw on their bank account for the business, but not to overdraw or to borrow. Having overdrawn the account for his own purposes, he borrowed money from plaintiff, and gave him a cheque of the firm, paying the money to the firm's credit in the bank, and using it for their business. It was held, that plaintiff could not recover on the cheque as it exceeded the authority given, but defendants were liable for money had and received: Reid v. Rigby, [1894] 2 Q. B. 40.

31. A power of attorney to draw, indorse, or accept bills, does not authorize the agent to become a party to accommodation paper: Wallace v. Branch Bank, 1 Ala. 565 (1840); North River Bank v. Aymar, 3 Hill (N. Y.) 262 (1842); Kingsley v. State Bank, 3 Yerger (Tenn.) 107 (1832); German Nat. Bank v. Studley, 1 Mo. App. 260 (1876). But the principal would be liable to a holder in due course: Edwards v. Thomas, 66 Mo. 469 (1877); North River Bank v. Aymar, supra.

Signing as agent or in representative capacity.

26. Where a person signs a bill as drawer, indorser or acceptor, and adds words to his signature indicating that he signs for or on behalf of a

principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability: § 26.

2. In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most fa orable to the validity of the instrument shall be adopted. Imp. Act, s. 26.

Agents and Officers of Corporations.—Notes and bills are constantly made, accepted and indorsed by agents and officers of corporations in such a way as to make it very difficult to say whether the signers are liable personally, or whether the principal or corporation is liable, or whether both are liable. The question in every such case is one of construction. Whose note or bill does it purport to be? If, on the true construction of the instrument, it is the note or bill of the principal or of the company, they will be liable on it, and not the individuals whose names are on it, unless it is the note or bill of both. On the other hand, if on the true construction, it is not the note or bill of the principal or company, the persons whose names are upon it will be liable, whether they intended to be so or not. The address of a bill and the body of a note are frequently more conclusive on this point than the words that may follow the signature.

The first impression on reading the section would be that it was intended to relax the somewhat severe rules that have been followed, in England and Ontario especially, in holding officers of companies personally liable on bills connected with the business of the company. It remains to be seen whether the Courts will so interpret it.

In the United States there has been a great conflict of decisions, but the tendency seems to be, on the whole, to relieve officers of corporations in certain cases where they would have been held liable in England or Ontario.

§ 26.

Officers of Corporations.

In making promissory notes on which a company alone is to be liable, officers would do well to use the name of the company in the body of the note and not the ordinary "I" or "we;" and if agents would sign the name of their principals first, followed by "per" or "per pro." before their own names, there would be less danger of ambiguity. In drawing bills the name of the company or principal should likewise be placed prominently in the foreground. In accepting bills they should look carefully to see who is the drawee, as this is usually the controlling circumstance in the case of bills, the form of whose acceptance might leave it a matter of doubt whether it was that of the company or of the officer accepting. Except in case of need or for honour it is only the draw that can accept. It is on this account that officers of companies have been held to be personally liable on bills where the acceptance would appear to be in the same terms as promissory notes where the officers signing them have been relieved from personal liability.

The officer of a company who becomes a party to a bill or note on its behalf in accordance with his powers under the by-laws is not personally liable. In the case of companies incorporated by letters patent under the general Dominion Act, he will be personally liable if the word "limited" does not appear in legible characters after the name of the company: R. S. C. c. 119, s. 79; so also in the case of companies incorporated by letters patent in Ontario, Nova Scotia, the North-West Territories and British Columbia: see ante p. 125.

Where from the terms of a bill, or from the words added to his signature, it is apparent that the person signing is merely doing so in the name of and on behalf of another who is fully disclosed, or that he is merely acting in a representative character, "he is not personally liable thereon," as he is not, properly speaking, a party to the bill. He may, however, be held liable in an action for false representation: West London Commercial Bank v. Kitson, 13 Q. B. D. 362 (1884).

ILLUSTRATIONS. § 26.

1. A note indorsed "Eastwood & Co., per J. Eastwood, jr." imports that the signer is not a partner, and he is not personally liable: Dowling v. Eastwood, 3 U. C. Q. B. 376 (1846).

2. A bill was drawn upon "P. C. De Latre, president N. D. & H. Co." and accepted by him in the same terms. He was held personally liable: Bank of Montreal v. De Latre, 5 U. C. Q. B. 362 (1848).

3. A bill was drawn on "W. A. Geddes, treas, W. I. C. Co." He accepted it "W. A. Geddes, treas. W. I. C. Co." and affixed the company's seal. He was held personally liable: Foster v. Geddes, 14 U. C. Q. B. 239 (1856).

4. A note in the words "we promise to pay" was signed G. H. C., "president G. T. Co." and F. A. W., "sec. G. T. Co." Held, that G. H. C. and F. A. W. were not personally liable: City Bank v. Cheney, 15 U. C. Q. B. 400 (1857).

5. Defendants purchased a load of coal, and in payment sent a bill signed by them with the word "agents" under their signature and accepted by their principals. They were held personally liable: Reid v. McChesney, 8 U. C. C. P. 50 (1858).

6. In settlement of a loss payable by an insurance company a note was given in these words: "I promise to pay," and signed "C. H. Gates, sec. O. M. & F. Co." He was held personally liable: Armour v. Gates, 8 U. C. C. P. 548 (1859).

7. A bill drawn by the secretary of a railway company on, and accepted by, the president, is not a bill of the company under the Act, as being accepted by the president and countersigned by the secretary, and the parties are personally liable: Bank of Montreal v. Smart, 10 U. C. C. P. 15 (1860).

8. A bill addressed "To the secretary R. G. M. Co." and accepted thus—"The R. G. M. Co., per James Glass, secretary," held not to be the acceptance of the secretary, and that he was not personally liable: Robertson v. Glass, 20 U. C. C. P. 250 (1869).

9. On a bill addressed "To H. M. Taylor. Tr. C. S. Ry. Co." and accepted thus,—"H. M. Taylor, Tr.," he was held personally liable: Laing v. Taylor, 26 U. C. C. P. 416 (1876).

10. On a bill addressed to an Insurance Co. by its inspector, signed "A. Squier, Inspector," he was held personally liable: Hagarty v. Squier, 42 U. C. Q. B. 165 (1877).

11. A bill addressed "To the President, Midland Railway" was accepted thus:—"For the Midland Railway of Canada: accepted, H.

§ 26.

Read, secretary, Geo. A. Cox, President." Held, that the president was personally liable: Madden v. Cox, 44 U. C. Q. B. 542 (1879); affirmed 5 Ont. A. R. 473 (1880).

Officers of corporations.

12. Where the president of a company signed a note for a debt of the company, thus "per O. A. H." and left a space above his signature for the company's name to be stamped, but the note was countersigned by the manager and delivered without this being done, it was held not to be the note of the president, and he was not personally liable: Brown v. Howland, 9 O. R. 48 (1885), affirmed 15 Ont. A. R. 750 (1887).

13. The maker of a note wrote below his signature the words "Attorney B. G. L." He was held personally liable: Hamilton v. Jones, Q. R. 10 S. C. 496 (1896).

14. A president and secretary signed a note which bore date before the incorporation of the company. They were held personally liable and were not allowed to produce evidence to show that when the note was negotiated the company was incorporated: Jardine v. Rowley, 15 N. S. (3 R. & G.) 244 (1882).

15. Defendant, as commissioner of the N. B. & C. Ry. Co., drew a bill on the company to pay for work done on the railway, and signed it "J. J. Robinson, commissioner." He was held personally liable: Peele v. Robinson, 9 N. B. (4 Allen) 561 (1860).

16. A note reading "we promise to pay" was signed "A. G. Bowes, Prest., Gazette Publishing Co." Held, on the authority of Fairchild v. Ferguson, infra, and overruling Canada Publishing Co., 32 N. B. 685 (1893), that it was the note of the company and not of Bowes personally: Canada Paper Co. v. Gazette Pub. Co., 32 N. B. 689 (1893).

17. A note reading "We promise to pay," etc., was signed "W. D. Rorison, Manager Otter Tail L. Co.,, The company was an unincorporated one, Rorison being a partner and the manager. His copartners alone were sued. The company received value for the note. Held, that the note was the company's, and not Rorison's individual note: Fairchild v. Ferguson, 21 S. C. Can. 484 (1892).

18. A man who puts his name to a bill of exchange makes himself personally liable unless he states upon the face of the bill that he subscribes it for another, or by procuration of another. Unless he says plainly "I am the mere scribe," he becomes liable: per Lord Ellenborough, in Leadbitter v. Farrow, 5 M. & S. at p. 349 (1816).

19. Defendants gave a note in these words:—"We the undersigned being members of the executive committee, on behalf of the L. & S. W. Ry. Co-operative Society, do jointly promise to pay," etc. Held,

that they were personally liable: Gray v. Raper, L. R. 1 C. P. 694 (1866). See also Courtauld v. Sanders, 16 L. T. N. S. 562 (1867). § 26.

20. On a promissory note in the words "I promise to pay" etc., signed: "For the M. T. & W. Ry. Co. —John Sizer, secretary," held that the secretary was not personally liable: Alexander v. Sizer, L. R. 4 Ex. 102 (1869).

21. Defendants sign a note, "We the Directors of the I. M. S. Co., promise to pay," etc., and affix the company's seal. They were held personally liable: Dutton v. Marsh, L. R. 6 Q. B. 361 (1871). See Penkivil v. Connell, 5 Ex. 381 (1850); Maclae v. Sutherland, 3 E. & B. 1 (1854).

22. A bill of exchange addressed to the B. & I. Co. which had no power to accept bills, was accepted thus: "Accepted for and on behalf of the B. & I. Co., G. K., F. S. P. directors, B. W., secretary." The directors and secretary were held personally liable to a holder in due course, as by their acceptance they represented that they had authority to accept for the company: West London Commercial Bank v. Kitson, 13 Q. B. D. (1884).

23. Where a note read, "I promise to pay," etc., and was signed "For the Providence Hat M'f'g. Co., A. B., agent," it was held to be the company's note, and not the agent's notwithstanding the words "I promise": Emerson v. Providence H. M. Co., 12 Mass. 237 (1815).

24. Where a bill contained the direction to "place to account of Derby Fishing Co." and was signed "A. B., President," the company was held to be the drawer: Witte v. Derby Fishing Co., 2 Conn. 260 (1817).

25. "We, the subscribers, jointly and severally promise," etc., and signed "For the Boston Glass Manufactory, A. B. & C.," was held to be the note of the individual makers: Bradlee v. Boston Glass Co., 16 Pick. 347 (1835).

26. A promissory note which reads, "four months after date we promise to pay to the order of George Moebs, Sec. & Treas., $1,061.24 at M. Bank, value received," signed "Peninsular Cigar Co., Geo. Moebs, Sec. & Treas." is a note drawn by, payable to, and indorsed by the corporation, and without ambiguity in the indorsement; and evidence is not admissible to show that it was the intention of the indorser in making the indorsement to bind himself personally: Falk v. Moebs, 127 U. S. 597 (1888).

Other Representative Capacities.—The same principles apply to those acting in other representative capacities, such

§ 26. as executors, administrators, trustees, guardians, tutors, curators, etc. With regard to these, the law in the other provinces in which the common law prevails is much more stringent in holding them personally than in the Province of Quebec where the principles of the civil law obtain. In Quebec the representative capacity or quality, as it is there called, is more fully recognized, and a bill or note signed in this form would be frequently treated as the bill or note of the person or body represented, where in England or the other provinces, the person actually signing would alone be held liable.

Where any person is under obligation to indorse a bill or note in a representative capacity he may do so in such terms as to negative personal liability: section 31, s.-s. 5. The usual method is to use the words "sans recours" or "without recourse" in indorsing.

ILLUSTRATIONS.

1. Defendants, as executors, purchased goods from plaintiffs and gave notes,—"We, as executors of the late B. P., promise to pay" etc., and after their signatures wrote "executors," etc. Held, that they were personally liable: Kerr v. Parsons, 11 U. C. C. P. 513 (1861).

2. A firm assigned for the benefit of creditors. The assignee continued the business and gave plaintiffs notes for goods, signing the firm name, and also his own followed by the word "Assignee." He was held personally liable: Boyd v. Mortimer, 30 O. R. 290 (1899).

3. Where trustees of an insolvent estate under a deed of composition, which gave them no power to draw or accept bills, signed promissory notes with the words "Trustees to estate C. D. Edwards" after their signatures, held that they were personally liable: Archibald v. Brown, 24 L. C. J. 85 (1879).

4. On a promissory note whereby the makers as executors of the late T. promise to pay, they are personally liable, when they do not expressly limit their liability to pay out of the estate: Childs v. Monins, 2 Brod. & B. 460 (1821).

5. The churchwardens for a debt of the parish gave a note signed "J. B. and G. W., churchwardens," for which they were held personally liable: Rew v. Pettet, 1 A. & E. 196 (1834).

6. Executors carrying on the business of the testator as directed by the will, in the ordinary course, accepted a bill describing themselves simply as executors of the testator. They were held personally liable. Liverpool Borough Bank v. Walker, 4 DeG. & J. 24 (1859). § 27.

7. A., B. and C. signed a note in the following terms: "We the undersigned, in the name and on behalf of the Reformed Presbyterian Church, Stranraer, promise to pay," etc.:—Held, that A., B. and C. were personally liable on the note: McMeekin v. Easton, 16 Court of Session Cases, 363 (1889).

"**The Construction Most Favorable to the Validity of the Instrument.**—This is in accordance with the maxim, ut res magis valeat. In many of the cases in which an agent or officer has been held personally liable on a bill, it is quite evident that he did not intend to bind himself personally, and there is a great deal to be said in favor of his not being liable; but inasmuch as he did not legally bind his principal or the company as the case may be, he has been condemned personally on the principle laid down in this sub-section.

The Consideration for a Bill.

27. Valuable consideration for a bill may be constituted by—

Valuable consideration, how constituted

(*a*) Any consideration sufficient to support a simple contract;

(*b*) An antecedent debt or liability; such a debt or liability is deemed valuable consideration, whether the bill is payable on demand or at a future time: Imp. Act, s. 27, 1 (*a*) (*b*).

The terms "valuable consideration" and "value" in the Act are synonymous: section 2. "It is necessary in the English law that an agreement, in order to create a legal contract, should include in the matter agreed upon, besides a promise, what is called a consideration for the promise. The consideration may be described generally as some matter accepted or agreed for as a return or equivalent for the pro-

§ 27. Consideration for a bill.

mise made. A promise merely voluntary, that is, made without consideration, if it rests in agreement only, is not binding in law": Leake, p. 5. "A valuable consideration in the sense of the law, may consist either in some right, interest, profit, or benefit, accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other": Currie v. Misa, L. R. 10 Ex. 162 (1875). In the French law the word "cause," which takes the place of the English "consideration," has a wider meaning, and includes natural or moral obligations: Pothier on Obligations, Nos. 42, 43; Code Napoleon, Arts. 1108, 1131; 16 Laurent, 107-111; 24 Demolombe, p. 329. A mere moral obligation is not a sufficient consideration for a bill or note in England: Eastwood v. Kenyon, 11 A. & E. 438 (1840); but may be in Quebec: Lockerby v. O'Hara, M. L. R. 7 S. C. 35 (1890); Bedard v. Chaput, Q. R. 15 S. C. 572 (1899).

The meaning of "sans cause" seems in the French law to be confined to what in English law would be called total failure of consideration as distinguished from mere absence of consideration: 16 Laurent, 111-119; 24 Demolombe, p. 342. The Civil Code of Lower Canada has introduced the English "consideration" as a synonym for the French "cause." One of the requisites to the validity of a contract is, "a lawful cause or consideration": C. C. Art. 984. "A contract without a consideration or with an unlawful consideration has no effect": C. C. Art. 989. The Privy Council has held in a case from Quebec that there is no difference between French law and English law as to the necessity for a valuable consideration for the validity of a contract: McGreevy v. Russell, 56 L. T. N. S. 501 (1887).

As the subject of contract is within the jurisdiction of the local legislatures, the validity or invalidity of bills and notes on the question of consideration may vary in the different provinces, and where contracts on a bill or note, or rights in it, arise in more than one province, the application

of the principles of international law will be required for their solution. See notes on sections 22 and 71. § 27.

"(a)"—"An agreement containing a promise made by the one party, for a valid consideration, and agreed to by the other party, creates at common law a contract by force of the mere agreement and the contract so created is a simple contract": Leake, p. 7.

"(b)"—Formerly in England it was doubted whether an antecedent debt was a valid consideration for a bill payable on demand, but it was settled in accordance with the rule laid down in this clause in Currie v. Misa, L. R. 10 Ex. 153 (1875).

For the law as to accommodation bills see section 28. As to bills tainted with illegal consideration, fraud, etc., see section 29, s.-s. 2.

Evidence as to Consideration.—In Quebec under the code it was provided by article 2285, that when a bill or note contained the words "value received," value for the amount of it would be presumed to have been received on the bill or note and on the indorsements. The omission of these words did not render the instrument invalid, but threw upon the holder the onus of proving value: Duchesnay v. Evarts, 2 Rev. de Leg. 31 (1821): Hart v. Macpherson, Girouard, Lettres de Change, 66 (1848); Larocque v. Franklin Bank, 8 L. C. R. 328 (1858). These words were at one time considered necessary in England. In France the bill should state in what the value consists: Code de Com. Art. 110; but it has been held, that when a bill does not state the nature of the value, it is not on that account void, but the holder must prove what the value was: Cour de Cassation, 30th Aug., 1828.

Now every party whose signature appears on a bill or note is presumed to have become a party for value: section 30. While oral evidence is not admissible to vary the terms of the written contract between the parties, it is admissible

§ 27. to impeach the consideration for the contract, and notwithstanding the words "value received" or their equivalent, the defendant may prove by parol the want or failure of consideration, where, on the issues raised, that would be a defence: Foster v. Jolly, 1 C. M. & R. at p. 708 (1835); Abrey v. Crux, L. R. 5 C. P. at p. 45 (1869); Temple v. Jones, Ramsay A. C. 76 (1883); Taylor, § 1138. The evidence should be clear and conclusive: Ross v. Western L. & T. Co., Q. R. 11 Q. B. 292 (1900).

Consideration.

See also notes on section 3, ante p. 34.

ILLUSTRATIONS.

1. A debt due to a bankrupt estate is a good consideration for notes given to the trustees and assignees of the estate: Gates v. Crooks, Dra. 446 (1831).

2. A member of a joint stock company, not incorporated, lending, with the assent of the company, a sum of money out of the joint fund, to another member, and taking from him a note payable to himself individually, can recover on the note: Comer v. Thompson, 4 U. C. O. S. 256 (1836).

3. A guarantee indorsed on a note at the time of its execution in the following words: "We guarantee the payment of the within note," does not show a sufficient consideration for the promise, the case being within the Statute of Frauds: Lock v. Reid, 6 U. C. O. s. 295 (1842).

4. It is no defence to an action on a note to plead that it was given in payment of 200 hats and caps, and that they remained undelivered, without alleging that there was any default, neglect, or refusal on the part of the vendor: Anderson v. Jennings, 2 U. C. Q. B. 422 (1845).

5. Notes given to commissioners of a turnpike trust by the tenant for rent on a lease beyond the powers of the commissioners cannot be collected, although the tenant was in possession for the full term of the lease: Ireland v. Guess, 3 U. C. Q. B. 220 (1846).

6. A note given by A. to B. for a debt due by C., upon no consideration for forbearance, and upon no privity shewn between A. and C., cannot be enforced: McGillivray v. Keefer, 4 U. C. Q. B. 456 (1847).

7. A defence that the note was made to the holder as a gratuity and that the maker never received any consideration for it, is good: Poulton v. Dolmage, 6 U. C. Q. B. 277 (1850).

8. A debt due by a third party, but not payable, may form a valid consideration for a note: Dickenson v. Crow, 7 U. C. Q. B. 421 (1850). § 27.

9. A pre-existing debt is a good consideration in whole or in part for a note or bill: Gooderham v. Hutchison, 5 U. C. C. P. 241 (1855); Hillis v. Templeton, 7 U. C. L. J. 301 (1861); Evans v. Morley, 21 U. C. Q. B. 547 (1862); Canadian Bank of Commerce v. Gurley, 30 U. C. C. P. 583 (1880).

10. A note promising to pay to the Toronto Church Society or bearer £50 towards the support of a bishop to be appointed to a western diocese, held to be founded upon a sufficient consideration: Hammond v. Small, 16 U. C. Q. B. 371 (1858).

11. A note was made by the secretary of an insurance company in his own name for a loss, the policy being surrendered, and marked cancelled, and the note being payable three days after the loss would be payable according to the policy. Held, sufficient consideration: Armour v. Gates, 8 U. C. C. P. 548 (1859).

12. A pre-existing debt is a good consideration for a note, even although a mortgage on real estate had been taken to secure the same debt: Bank of Upper Canada v. Bartlett, 12 U. C. C. P. 238 (1862).

13. Defendant having endorsed a note for $1,250, to enable the maker to get as an additional advance the difference between that sum and the original loan of $918, advanced to him before the making of the note, which additional advance was, however, not made, it was held that defendant was not liable on the note for any sum: Greenwood v. Perry, 19 U. C. C. P. 403 (1869).

14. Value arising at any time during the currency of a note is sufficient: Blake v. Walsh, 29 U. C. Q. B. 541 (1870).

15. A note barred by the Statute of Limitations is a good consideration for a new note: Wright v. Wright, 6 Ont. P. R. 295 (1876).

16. A note payable on demand with interest held to be without consideration as to one of the makers, the note being for an old debt due by the other maker alone: Merchants' Bank v. Robinson, 8 Ont. P. R. 117 (1879).

17. When, after a note is completed, so far as the intention of the parties is concerned, it is signed by a third person, or is so signed by him after maturity, without any consideration moving directly to such third person, or any agreement to extend the time for payment, such third person is not liable thereon: Ryan v. McKerral, 15 O. R. 460 (1888).

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18. Notes given to an insurance company for premiums subsequently earned, are given for a valuable consideration and are valid: Wood v. Shaw, 3 L. C. J. 169 (1858).

19. A promissory note was given as an indemnity to a party assuming a liability for a third person. Held, that the payee could sue on the note as soon as troubled, and before paying the debt for which he had become liable: Perry v. Milne, 5 L. C. J. 121 (1861).

20. A dying man signed several cheques payable to the order of certain friends, and delivered them to his private secretary for the respective payees as parting gifts. He died before they were presented. Held, that the payees were entitled to payment of the cheques: Colvile v. Flanagan, 8 L. C. J. 225 (1864).

21. A note given to a new firm, after the dissolution of the old, in satisfaction of a guarantee given to the old for advances made by them, was held to have been given in error and without consideration, and therefore void: Henault v. Thomas, 1 R. L. 706 (1868).

22. Where a tenant was partly deprived of the use of the premises by works carried on by the corporation of Quebec, but at the end of the year gave his landlord a note for the full amount of the rent, there was sufficient consideration for the note, although the landlord was suing the corporation for damages to the leased premises: Motz v. Holiwell, 1 Q. L. R. 64 (1875).

23. On a sale of the stock of an insolvent made by the assignee, nominally to a third party, who in reality purchased for the insolvent, he accepted in part payment a note of the latter; held, that there was consideration for the note: Lemieux v. Bourassa, 1 Dorion, 305 (1881).

24. A promissory note given for consideration erroneously believed to be good in law, is not valid: Riel v. McEwen, Ramsay, A. C. 82 (1881).

25. Where an I. O. U., made to represent the value of a share in a business purchased by the plaintiff, was indorsed and transferred to the plaintiff by the vendor, the plaintiff could not sue the vendor thereon, while at the same time he retained the share acquired by him in the business, which was represented by the I. O. U.: Cridiford v. Bulmer, M. L. R. 4 Q. B. 293 (1886).

26. A note given for a patent which is not a new and useful invention is void for want of consideration: Almour v. Cable, Ramsay A. C. 87 (1886).

27. Want of consideration being established and there being no evidence of the fact of a gift to bring the case within Colvile v. Flanagan, supra, No. 26, the note was held void: Molleur v. Roy, 31 L. C. J. 99 (1887). § 27.

28. A draft made by B. & Co., through their agent D., given to a bank in payment of another draft by W. on S. in favour of D. (subsequently dishonored by S.) discounted by the bank to pay a note due by reason of a transaction by which B. & Co. never profited, and of which they were ignorant, is without consideration, and no action lies against B. & Co.: Union Bank v. Bryant, 17 Q. L. R. 93 (1891).

29. A note for the premium of a fire policy under the mistaken idea that the maker was the owner of the property, is without consideration, the policy itself being null: Assurance Mutuelle v. Lemay, Q. R. 12 S. C. 232 (1896).

30. Where a note was given as part payment of a purchase of land under a verbal agreement of sale, the plaintiff cannot recover for want of consideration: Black v. Gesner, 3 N. S. (2 Thomson) 157 (1847).

31. Where a note was given on a verbal purchase of land of which the defendant took possession, held to be for a good consideration: Gray v. Whitman, 3 N. S. (2 Thomson) 157 (1857).

32. A purely moral consideration (affection and regard) does not constitute sufficient consideration for a promissory note: Baker v. Read, 7 N. S. (1 G. & O.) 199 (1868).

33. A note was given in part payment of land when the deed was executed by plaintiff and his wife, and delivered; but plaintiff's wife was to go before a J. P. to be examined separate and apart from her husband, which she refused to do. Held, that the delivery of the deed was a good consideration, and parol evidence of an agreement to vary the terms of the note should not have been received: Graham v. Graham, 11 N. S. (2 R. & C.) 265 (1877).

34. C. made an assignment under the Insolvent Act. One of the debts due him was by a woman whom he subsequently married. After her marriage the assignee induced her to give a note, the husband signing as a surety: Held, that there was no consideration for her giving the note: McDaniel v. McMillan, 11 N. S. (2 R. & C.) 405 (1876).

35. A deed of land was made by a father to one of his sons, who, at the father's request, gave his promissory notes payable to the other brothers respectively, the arrangement being for the purpose of distributing the estate of the father without a will.

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Held, that the payees could not recover on the notes for want of consideration moving from them to the maker: Forsyth v. Forsyth, 13 N. S. (1 R. & G.) 380 (1880).

36. A., who was indebted to plaintiffs, sold defendant a threshing machine, and took his note, which at A.'s request was made payable to plaintiffs. A. sent plaintiffs the note, but they knew nothing of the transaction for which it was given. Held, that they could not recover on the note for want of consideration moving from them to defendant: Cossitt v. Cook, 17 N. S. (5 R. & G.) 84 (1884).

37. An agreement to forbear for thirty days is a good consideration for an acceptance: Lyons v. Donkin, 23 N. S. 258 (1891). See also Hubley v. Morash, 27 N. S. 281 (1894), and McGregor v. McKenzie, 30 N. S. 214 (1897).

38. A promissory note given in satisfaction of a claim for damages for an assault on plaintiff's minor son is binding: Hubley v. Morash, 27 N. S. 281 (1894).

39. Defendant gave his note to the city for arrears of rent on condition of his getting a lease on the same terms as the previous lessee. There was no power to lease except by auction. Held, that the defendant was not liable on the note: City of Fredericton v. Lucas, 8 N. B. (3 Allen) 583 (1857).

40. A note given to a brother of a deceased intestate by the person who received the estate, on the ground that if the deceased had left a will, he would have left his brother the amount of the note, is void for want of consideration: McCarroll v. Reardon, 9 N. B. (4 Allen) 261 (1859).

41. A note given by A. to his son-in-law B. by way of advancement to B.'s wife held void for want of consideration: Thomas v. McLeod, 12 N. B. (1 Han.) 588 (1869).

42. A note was given by a son in payment of his father's debt. Held, that it was not invalid for want of consideration: Street v. Quinton, 18 N. B. 567 (1879).

43. Release from imprisonment for non-payment of a fine and costs is a good consideration for a note for the amount of the fine and costs: Proctor v. Parker, 12 Man. R. 528 (1899).

44. Where a note was given to an infant, nine years of age, affection for the child and gratitude were held not sufficient consideration to bind the estate of the maker in favor of the payees: Holliday v. Atkinson, 5 B. & C. 501 (1826). See Fuller v. Lumbert, 78 Me. 325 (1886).

45. Cross acceptances for mutual accommodation are respectively considerations for each other: Cowley v. Dunlop, 7 T. R. 565 (1798); Newman v. Frost, 52 N. Y. 424 (1873).

46. A note for the price of land may be binding on the maker, although the contract is not binding on account of the Statute of Frauds: Jones v. Jones, 6 M. & W. 84 (1840).

47. A debt represented to be due, but not really due, is not a sufficient consideration: Southall v. Rigg, 11 C. B. 481 (1851); nor is the giving up of a void note: Coward v. Hughes, 1 K. & J. 443 (1855).

48. A promise to give up a bill thought to be invalid is a sufficient consideration: Smith v. Smith, 13 C. B. N. S. 418 (1863); as is also a debt barred by the Statute of Limitations: La Touche v. La Touche, 3 H. & C. at p. 576 (1865); Giddings v. Giddings, 51 Vt. 227 (1878). So is the bona fide compromise of a disputed claim, although it afterwards appears that the claim was wholly unfounded: Callisher v. Bischoffsheim, L. R. 5 Q. B. 449 (1870).

49. The voluntary gift of a sum of money is not a valid consideration: Hill v. Wilson, L. R. 8 Ch. at p. 894 (1873).

50. An agreement to pay a debt within three years is no consideration for giving a note payable on demand: Stott v. Fairlamb, 52 L. J. Q. B. 420, per Denman, J. (1883).

51. Actual forbearance from suing a third party is a good consideration for a note, although there was no contract to forbear: Crears v. Hunter, 19 Q. B. D. 341 (1887). Followed in Creelman v. Stewart, 28 N. S. 185 (1896).

52. The manager of a bank stole certain securities which he negotiated. He subsequently obtained them from the purchasers by fraud and returned them to the bank. Held, that the bank was a holder for value: London and County Bank v. London and River Plate Bank, 21 Q. B. D. 535 (1888).

53. A promissory note given for a mere moral obligation is not binding, but where the maker had made payments thereon, and afterwards became a lunatic, the Court recognized it as a debt of honor to be paid out of the estate: In re Whittaker, 42 Ch. D. 119 (1889).

54. Where a promise to pay £200 was supposed to be enforceable, though not in fact so, a promissory note given to postpone payment of such sum was given for a good consideration: Kingsford v. Oxenden, 7 T. L. R. 565 (1891).

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55. An undertaking by a bank to give a customer credit on his general account for a cheque deposited, is a sufficient consideration to constitute the bank a holder for value: Royal Bank v. Tottenham, [1894] 2 Q. B. 715.

56. A pre-existing debt is a good consideration for a promissory note payable on demand for a larger amount than the debt due: Haslam v. Williams, 14 N. S. W. R. (Law) 110 (1893).

57. The accomplishment of the objects of an educational institution held to be sufficient consideration for a note: Wesleyan Seminary v. Fisher, 4 Mich. 515 (1857); Roche v. Roanoke Seminary, 56 Ind. 198 (1877).

58. A note given in settlement of a civil suit for damages against the maker's brother, is founded upon sufficient consideration: Smith v. Richards, 29 Conn. 232 (1860).

59. When A. is indebted to B. and B. to C., and A. gives his note, in extinguishment of both debts, to C., there is sufficient consideration: Outhwite v. Porter, 13 Mich. 533 (1865).

60. An agreement not to bring suit on the debt or on other liability of one person is a valid consideration for the commercial paper of another: Randolph v. Peck, 1 Hun 138 (1874); Abbott v. Fisher, 124 Mass. 414 (1878).

61. Subscriptions for stock in an incorporated company are a sufficient consideration for a note: Chetlain v. Republic Life Ins. Co., 86 Ill. 220 (1877).

62. Mere forbearance, without an agreement to forbear, is not a sufficient consideration for a note: Manter v. Churchill, 127 Mass. 31 (1879); Smith v. Bibber, 82 Me. 34 (1889). But see No. 51. supra.

63. The donee's own note may be made a gift, mortis causa, and its destruction by the donor, with intent that it be released in the event of his death, will effect it: Darland v. Taylor, 52 Iowa 503 (1879).

64. The compromise of a claim, which the party putting it forward knew was unfounded and illegal, is not a sufficient consideration: Ormsbee v. Howe, 54 Vt. 182 (1881).

65. The gift of the donor's own note as a donatio mortis causa is not valid as his representatives may prove that it was without consideration: Baskett v. Haskell, 107 U. S. 602 (1882).

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66. The consideration for the acceptance of drafts which were given for the future delivery of coal, does not fail by reason of the non-delivery thereof, since a promise to deliver is a sufficient consideration for the acceptance: Tradesmen's Nat. Bank v. Curtis, 167 N. Y. 194 (1901).

Total Failure of Consideration.—Every party whose signature appears on a bill or note is presumed to have become a party to it for valuable consideration, but he may prove the contrary. If a total failure of consideration be proved, it is a good defence if the plaintiff and defendant are immediate parties, that is, if they contracted directly with each other, or even if they are remote parties, provided value has not been given for the bill. A total failure of consideration has the same effect upon the liability of the parties as an original want of consideration.

ILLUSTRATIONS.

1. A. being seized in fee of lands, made jointly with B. a lease to C., taking notes from C. for the rent. The day after the execution of the lease A. died intestate, and then B. died and his executors sued C. on the notes. Held, that they could not recover, the consideration having wholly failed: Merwin v. Gates, 1 Rob. & Jos. Dig. 529 (1837).

2. When a stockholder in a joint stock company had given notes for his stock, which he afterwards forfeited by not complying with the conditions of the association, it was held that there was not a failure of consideration, and it was no defence to an action on the notes: Glassford v. McFaul, 1 Rob. & Jos. Dig. 537 (1840).

3. Where a note was given for logs on condition that no claim should be made for the logs, and they were revendicated, there was a total failure of consideration and the note became null: Gamsby v. Chapman, 13 L. C. R. 239 (1862).

4. Where the discharge of an insolvent was annulled by the Court, the indorsers remained liable on the composition notes, and there was not a total failure of consideration: Marchand v. Wilkes, 3 L. N. 318 (1880).

5. A. appointed B. his executor and gave him a demand note to compensate him. B. died first and his executors sued on the note. It was held that there was a total failure of consideration and the action failed: Solly v. Hinde, 6 C. & P. 316 (1834). See Wells v. Hopkins, 5 M. & W. 7 (1839).

§ 27. 6. A. draws a bill at three months on B. in favor of C., to be paid for in seven days. B., who is A.'s agent, accepts on his account. C. does not pay A. He cannot sue B.: Astley v. Johnson, 5 H. & N. 137 (1860).

7. When bills are given for a cargo, and owing to the inability of the acceptor to meet the bills the cargo is sold by the drawer at a loss, the latter should sue for the difference in price, and not sue upon the bills, which fail for want of consideration: Bevan v. Stevenson, 1 T. L. R 587 (1885).

8. In a suit upon a renewal note total failure of consideration of the original note is available as a defence: Hooker v. Hubbard, 102 Mass. 239 (1869).

9. Total want of title constitutes a total failure of consideration: Curtis v. Clark, 133 Mass. 509 (1882).

Partial Failure of Consideration.—When the consideration for a note has only partially failed, the question as to how far it may be set up as a defence, is largely a question of pleading. Formerly it would not be allowed in England or the provinces where the old English rules of pleading were followed. Now in England and Ontario it may be set up as a defence pro tanto as between the original parties, or between those who are in the same position, provided the failure be for a definite sum clearly ascertained.

Failure of consideration should not be confounded with inadequacy of consideration.

ILLUSTRATIONS.

Failure of Consideration.

1. Where a note was given on an exchange of horses, the maker, when sued on the note two years later, was not allowed to set up as a defence that the horse he received was not sound as warranted: Hall v. Coleman, 3 U. C. O. S. 39 (1833).

2. In the following cases a partial failure of consideration was held to be no defence in actions on bills and notes between immediate parties: Dalton v. Lake, 4 U. C. O. S. 13 (1834); Dixon v. Paul, ibid. 327 (1835); Kellogg v. Hyatt, 1 U. C. Q. B. 445 (1841); Matthewson v. Carman, 1 ibid. 266 (1843); Brown v. Garret, 5 ibid. 243 (1848); Thompson v. Farr, 6 ibid. 387 (1849); Orser v. Mounteny, 9 ibid. 382 (1851); Goldie v. Harper, 31 O. R. 284 (1899); Spelman v. Robidoux, 1 R. C. 241 (1871); Renaud v. Bougie, Q. R. 16 S. C. 405 (1899); Brundige v. Delaney, 8 N. S. (2 G. & O.) 62

(1870); Hill v. McLeod, 17 N. S. (5 R. & G.) 280 (1884); McIntosh v. McLeod, 18 N. S. (6 R. & G.) 128, 6 C. L. T. 449 (1885); Whitman v. Parker, 18 N. S. (6 R. & G.) 155, 6 C. L. T. 448 (1885); Clarke v. Ash, 5 N. B. (3 Kerr) 211 (1846); Glennie v. Imri, 3 Y. & C. 436 (1839); Warwick v. Nairn, 10 Ex. 762 (1855). § 27. Failure of Consideration

3. In the following cases it was held, that the partial failure of consideration was not sufficiently definite or clearly ascertained to be allowed as a defence in part: Coulter v. Lee, 5 U. C. C. P. 201 (1856); Henderson v. Cotter, 15 U. C. Q. B. 345 (1858); Georgian Bay L. Co. v. Thompson, 35 U. C. Q. B. 64 (1874); Kilroy v. Simkins, 26 U. C. C. P. 281 (1876); Fletcher v. Noble, 8 O. R. 122 (1885); Home Life Association v. Walsh, 36 N. S. 73 (1903); McGregor v. Harris, 30 N. B. 456 (1891), affirmed in the Supreme Court, Esson v. McGregor, 20 S. C. Can. 176 (1892); O'Donohue v. Swain, 4 Man. 476 (1886); Day v. Nix, 9 Moore, 159 (1824). In a number of the cases in this and No. 2, supra, the decision is based largely upon the technical rules of pleading that then prevailed. Under the modern Judicature Acts, it might in most cases be set up by way of counterclaim.

4. In the following cases a partial failure of consideration, where the amount was definitely ascertained, was allowed as a defence pro tanto between immediate parties: O'Brien v. Ficht, 18 U. C. Q. B. 241 (1859); Barber v. Morton, 7 Ont. A. R. 114 (1882); Star Kidney Pad Co. v. Greenwood, 5 O. R. 28 (1884); Lalonde v. Rolland, 10 L. C. J. 321 (1864); Fisher v. Archibald, 8 N. S. (2 G. & O.) 298 (1871); Agra Bank v. Leighton, L. R. 2 Ex. 56 (1866). Also between remote parties, where the plaintiff became the holder only after maturity: Rennie v. Jarvis, 6 U. C. Q. B. 329 (1850); McGregor v. Bishop, 14 O. R. 7 (1887).

2. Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time: Imp. Act, s. 27 (2). Holder for value.

The holder of a bill is the payee or indorsee of a bill payable or indorsed to his order, who is in possession of it, or the person who is in possession of a bill payable to bearer: section 2. The holder for value may not be a holder in due course: section 29; Raphael v. Bank of England, 17 C. B. at p. 174 (1855). He may have taken the bill or note after

§ 27. maturity and dishonor. He need not have given value himself, it is sufficient that some previous holder has done so, in order to enable him to recover on the bill from the prior parties: Milnes v. Dawson, 5 Ex. 948 (1850). For the rights of a holder, see section 38. Until value has been given for a bill it cannot be enforced against any of the parties even though it may have passed through the hands of a number of holders: Perry v. Rodden, 5 R. L. 477 (1873).

ILLUSTRATIONS.

1. An indorsee without value is entitled to recover on a bill or note if any intermediate party is a holder for value: Wood v. Ross, 8 U. C. C. P. 299 (1859); Hunter v. Wilson, 4 Ex. 480 (1849); Oulds v. Harrison, 10 Ex. 579 (1854).

2. A bill is drawn payable to the order of the drawer, and the drawee accepts for the accommodation of the drawer, but subsequently receives value from him. The drawer thereby becomes a holder for value as against the acceptor: Burdon v. Benton, 9 Q. B. 843 (1847).

3. A. drew a bill on B. to the order of C., and delivered it to D., who received value for the bill from C., but who did not pay A. C. is a holder for value and can recover on the bill from A.: Munroe v. Bordier, 8 C. B. 862 (1849).

As to lien 3. Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien. Imp. Act, s. 27 (3).

A lien is the right to retain possession of a thing belonging to another until a claim be satisfied. Where bills and notes are deposited as collateral security for a debt, the creditor acquires a lien upon them by contract: Ex parte Twogood, 19 Ves. 229 (1812); Ex parte Schofield, 12 Ch. D. 337 (1879); Belanger v. Robert, Q. R. 21 S. C. 518 (1902). If while they are in the possession of the creditor, the debtor contracts other debts, he will have, in the absence of agreement to the contrary, a lien on them by implication of law

for the payment of these new debts: C. C. Art. 1975. In England a banker has a lien by implication of law on all bills or notes received from his customers in the ordinary course of banking business to secure any balance that may be due: Brandao v. Barnett, 3 C. B. at p. 531 (1846); Johnson v. Robarts, L. R. 10 Ch. 505 (1875); Misa v. Currie, 1 App. Cas. at p. 569 (1876); London Chartered Bank of Australia v. White, 4 App. Cas. 413 (1879); Re Bowes, 33 Ch. D. 586 (1886). § 27.

If the amount of the lien is less than the note, the holder is a trustee for the pledgor for the difference: Reid v. Furnival, 1 Cr. & M. 538 (1833).

ILLUSTRATIONS.

1. A holder received a £30 note as security for a £10 loan. He can only recover £10 from the accommodation maker: Strathy v. Nicholls, 1 U. C. Q. B. 32 (1844). As to lien.

2. The holder of promissory notes transferred by the payee as collateral security against a future liability on the holder's part for the payee, can collect the notes at maturity before that liability arises, and hold the proceeds to the extent of his liability: Ross v. Tyson, 19 U. C. C. P. 294 (1869).

3. When a $200 note is deposited as collateral to a discounted note of the same amount, it may be retained as collateral to a partial renewal of the discounted note for $175, and the latter not being paid the holder can recover $175 from the maker of the collateral note: Canadian Bank of Commerce v. Woodward, 8 Ont. A. R. 347 (1883).

4. A creditor who has received the promissory notes of third parties as collateral security, is not responsible to the debtor for laches with respect to the collection of the notes or want of notice to the debtor, unless the latter has been injured thereby: Ryan v. McConnell, 18 O. R. 409 (1889).

5. Where a seller took customers' notes and hire receipts as collateral, discounted the notes with a bank, letting the bank know the circumstances, but not giving the receipts with the notes, the receipts were held to be accessory to the debt, and on default the bank was entitled to have them handed over: Central Bank v. Garland, 20 O. R. 142 (1890); affirmed in Appeal, 18 Ont. A. R. 438 (1891).

§ 27. 6. Bills and notes held as collateral security may found a writ of attachment in insolvency against the maker: Hutchins v. Cohen, 14 L. C. J. 85 (1869).

As to lien. 7. The holder of a promissory note as collateral security for a loan is a holder for value within the meaning of Art. 2287 of the Civil Code: Exchange Bank v. Normand, 13 R. L. 30 (1884).

8. An agent holds a bill indorsed in blank. He fraudulently pledges it to a party who makes an advance on it in good faith. The pledgee can hold it against the principal for the amount due him: Collins v. Martin, 1 B. & P. 648 (1797).

9. A., the holder of a bill for £100, deposits it with B. as security for a running account. When the note matures there is a balance in A.'s favor, but subsequently there is a balance of £50 against him. B. is a holder for value for £50: Atwood v. Crowdie, 1 Stark. 483 (1816).

10. Where a bill is negotiated from one person to another it will be presumed that it has been wholly transferred. He who claims that it was only pledged or deposited as collateral security must prove it: Hills v. Parker, 14 L. T. N. S. 107 (1866); Re Boys, L. R. 10 Eq. 467 (1870).

11. If a banker negotiates a bill that he knows does not belong to his customer, no lien can attach: Ex parte Kingston, L. R. 6 Ch. 632 (1871).

12. A depositor has two accounts in a bank. He indorses a bill as collateral security for one account and draws for part of the amount. He fails and the other account is overdrawn more than the balance of the bill. The bank is holder of the bill for full value: Re European Bank, L. R. 8 Ch. 41 (1872).

13. Where a bill is discounted, the party discounting it does not hold it as collateral security, or as a pledgee, but is a holder for full value: Re Gommersall, 1 Ch. D. 142 (1875); Ex parte Schofield, 12 Ch. D. 337 (1879).

14. The drawer of an accommodation bill indorses it as a security for a smaller sum. The acceptor fails. The indorsee can prove for the full amount of the bill, but cannot receive dividends in excess of the amount of the loan: Ex parte Newton, 16 Ch. D. 330 (1880).

15. Solicitors cannot acquire a lien as against the acceptors on a bill which their client received from the acceptors to discount, when the solicitors received it after maturity with knowledge of the facts: Redfern v. Rosenthal, 86 L. T. N. S. 855 (1902).

16. Accommodation paper may be pledged as collateral: Washington Bank v. Krum, 15 Iowa 53 (1863).

28. An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person: Imp. Act, s. 28 (1). § 28. Accommodation party to a bill.

A bill may be drawn or indorsed by accommodation parties without being an accommodation bill. It is only when the acceptor of a bill or the maker of a note is an accommodation party, that it is strictly an accommodation bill or note. The person accommodated need not be a party to the bill or note. Where an accommodation bill is paid in due course by the party accommodated the bill is discharged: section 59, s-s. 3. Where an accommodation bill is accepted, for the benefit of the drawer or an indorser, he is liable without presentment for payment, protest, or notice of dishonor: section 46, s-s. 2 (*c*) and (*d*), section 50, s-s. 2 (*c*) (4), and s-s. 2 (*d*) (3); section 51, s-s. 9. As to the negotiation of an overdue accommodation bill, see section 36, s-s. 2. Every party whose signature appears on a bill is prima facie deemed to have become a party for value, so that any person claiming to be an accommodation party must make clear proof of that fact: section 30; Morehouse v. Burland, Ramsay, A. C. 280 (1875); Parker v. Fuller, ibid. 281 (1877).

Where parties exchange promissory notes for the same amount, payable each to the order of the other, and each uses the note of the other, both notes are thereby converted from accommodation to business paper, and the maker of each becomes liable as a principal debtor: State Bank v. Smith, 155 N. Y. 185 (1898).

Where notes were agreed to be made and indorsed indiscriminately by a number of partners and the proceeds go to the benefit of the joint concern, they were held to be accommodation notes, and one partner could not recover as a holder from his co-partners: Bowes v. Holland, 14 U. C. Q. B. 316 (1856).

§ 28.

Accommodation party.

Where there is a running account between the drawer and drawee, and a bill is accepted, it is not an accommodation bill, even although the account was against the drawer at the time of acceptance: Re Overend, Gurney & Co., Ex parte Swan, L. R. 6 Eq. 356 (1868).

Where the drawer and acceptor receive a commission for drawing and accepting the bill from a person who does not become a party to it, this is an accommodation bill: Oriental Financial Corporation v. Overend, L. R. 7 Ch. 142 (1871).

An accommodation bill is not issued, within the meaning of section 64 of the Act (63 of the Canadian Act), until it comes into the hands of some person who can sue upon it: Engel v. Stourton, 5 T. L. R. 444; 53 J. P. 535 (1889).

His liability.

2. An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not. Imp. Act. s. 28 (2).

The rights of a holder for value have been defined in section 27, s-s. 2 and 3. An accommodation party occupies the relation of a surety with respect to the person for whose accommodation he has become a party, and may set up any defence connected with the bill that his principal could. He may also be released by the holder giving time to the principal, if the holder is aware of the relation between them: Bechervaise v. Lewis, L. R. 7 C. P. 372 (1872).

ILLUSTRATIONS.

1. A second accommodation indorser, who has paid a note, may recover from a prior accommodation indorser: Breeze v. Baldwin, 5 U. C. O. S. 444 (1837).

2. It is no defence by a maker of a note payable to bearer that it was made for the accommodation of a third party, and that plaintiffs hold it without value or consideration: Muir v. Cameron, 10 U. C. Q. B. 356 (1852); overruling on this point Strathy v. Nicholls, 1 U. C. Q. B. 32 (1844).

3. It is no defence by the maker that the plaintiff, indorsee, gave no value to the indorser for his indorsement, or that he took the note knowing that it was indorsed for the accommodation of the maker, without denying that he is a holder for value: Miller v. Ferrier, 7 U. C. Q. B. 540 (1850). § 29. Accommodation party

4. The indorser of a note to enable the maker to get goods from the payee is liable on an action by the payee: Moffatt v. Rees, 15 U. C. Q. B. 527 (1857). See also Peck v. Phippen, 9 U. C. Q. B. 73 (1851); Foster v Farewell, 13 U. C. Q. B. 449 (1855); Gunn v. McPherson, 18 U. C. Q. B. 244 (1859); Smith v. Richardson, 16 U. C. C. P. 210 (1865).

5. The holder of a bill for value, notwithstanding his having subsequently become aware of its being an accommodation bill, may release the drawer without releasing the acceptor: City of Glasgow Bank v. Murdock, 11 U. C. C. P. 138 (1861).

6. Accommodation indorsers, after the note on which they were liable had matured, filed a bill against the holder and maker to enforce payment against the latter. The relief prayed was granted, and the maker was ordered to pay the costs both of the plaintiff and the holder of the note: Cunningham v. Lyster, 13 Grant, 575 (1867).

7. The holder of accommodation paper, knowing it to be such, may rank upon the estate of and discharge the indorsers, and then recover the balance from the accommodation maker: Lyman v. Dyon, 13 L. C. J. 160 (1868).

[illegible] holder for value can recover from the accommodation [illegible] amount of a note although he was aware of the fact [illegible]k it, and was interested in the transaction out of which it arose: Belque v. Bury, 3 L. N. 160 (1880); Scott v. Quebec Bank, 7 L. N. 343 (1884); Bankers' Iowa Bank v. Mason Lathe Co., 90 N. W. Rep. 612 (Iowa, 1902).

29. A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:— Holder in due course

(*a*) That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact;

(*b*) That he took the bill in good faith and for value, and that at the time the bill was negotiated

§ 29. to him he had no notice of any defect in the title of the person who negotiated it: Imp. Act, s. 29 (1) (*a*) (*b*).

"**Holder in Due Course**" is used in the Act as an equivalent for the old expression, "bona fide holder for value without notice." Holder has been defined in section 2 as the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof; and bearer as the person in possession of a bill or note which is payable to bearer. The rights and powers of a holder, and holder in due course respectively, are set out in section 38. A holder for value, who has taken a bill under circumstances that do not meet all the conditions of the present section, has all the rights of an ordinary holder, and in addition, those mentioned in sections 27, 28 and 58.

It was laid down by Lord Russell, C.J., in Herdman v. Wheeler, 67 L. J. Q. B. 224; and 14 T. L. R. 149 (1897), that the payee of a note could not become a holder in due course, as it could not be said that the note had been "negotiated" to him in accordance with this section and section 33, s-s. 3. In Herdman v. Wheeler, [1902] 1 K. B. at p. 371, this was questioned, and attention was called to the fact that in the former case the definition of the word "holder" had been apparently overlooked, but it was held that in neither of these cases was it necessary to decide the point.

In the negotiation of a bill to a holder in due course, the transferrer frequently conveys greater rights than he himself possesses. The bill may have been without value in his hands, or void for fraud, illegality or other defect, but these are cured on its coming into the hands of a holder in due course: Whistler v. Forster, 14 C. B. N. S. 248 (1863).

Complete and Regular on the Face of It.—Such a bill must meet all the requirements of the definition in section 3, and be without blanks, and not wanting in any material particular: see section 20 and notes thereon. An undated bill is not invalid: section 3, s-s. 4; but it is irregular, especially

if payable at a fixed period after date. A person taking a bill incomplete or irregular, even before maturity, and for full value in good faith, does not acquire the rights of a holder in due course. § 29.

The fact of a cheque being post-dated does not prevent its being regular within the meaning of this section: Hitchcock v. Edwards, 60 L. T. N. S. 636 (1889); Carpenter v. Street, 6 T. L. R. 410 (1890).

Plaintiff received an overdue bill accepted and indorsed, but not signed by the drawer. He was not a holder in due course: South Wales v. Underwood, 15 T. L. R. 157 (1899).

As to a bill bearing marks of cancellation, see section 62 and notes thereon.

Not Overdue.—The maturity of bills not payable on demand is determined by the rules laid down in section 14; those payable on demand are deemed to be overdue when in circulation for an unreasonable length of time: section 36, s-s. 3. A demand note would not be considered overdue for the purposes of the present section, solely on the ground that a reasonable time for presenting it for payment had elapsed since its issue: section 85.

Without Notice of Dishonor or Defect.—The fact that a bill had been dishonored by non-acceptance, or if a demand bill, for non-payment, would not prevent a person from becoming a holder in due course, if it bore no mark of protest or dishonor, and if he had no notice otherwise: Dunn v. O'Keefe, 5 M. & S. 282 (1816).

Formal notice is not necessary; it is enough that the party have knowledge, or even a suspicion, and that he wilfully shuts his eyes: Raphael v. Bank of England, 17 C. B. 173 (1855); Jones v. Gordon, 2 App. Cas. 616 (1877); Banque d'Hochelaga v. Grenier, 3 R. J. 86 (1896). Mere negligence however on the part of the person taking a bill does not fix him with the defective title of the party passing Notice of defect.

§ 29. it to him: Goodman v. Harvey, 4 A. & E. 870 (1836); Bank of Bengal v. Fagan, 7 Moore P. C. 61 (1849).

Notice to the agent is notice to the principal and vice versa, but when a bill is negotiated to one and notice is given to the other, a reasonable time must be given for communication: Willis v. Bank of England, 4 A. & E. at p. 39 (1835); Collinson v. Lister, 7 De G. M. & G. at p. 637 (1855). If the agent is a party to a fraud he is not presumed to have advised his principal of it: Ex parte Oriental Bank, L. R. 5 Ch. 358 (1870).

Good Faith.—A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not: section 89; see the notes on that section. "Good faith is always presumed. He who alleges bad faith must prove it": C. C. Art. 2202. "Gross negligence may be evidence of bad faith, but it is not the same thing": Lord Denman in Goodman v. Harvey, supra, at p. 881.

For Value.—Value means valuable consideration: section 2. For the meaning of valuable consideration see section 27, and the notes thereon. Value is presumed to have been given whether the bill or note contains the words "value received" or not: section 30.

Negotiation of Bill.—A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill. A bill payable to bearer is negotiated by delivery: section 31, s-s. 2. A bill payable to order is negotiated by the indorsement of the holder completed by delivery: section 31, s-s. 3. The holder need not be the owner of the bill; he may, for example, be merely a pledgee, or hold it for discount, collection, or the like: section 27, s-s. 3.

When a note payable to a firm was indorsed and transferred to a member of the firm, any defence that would be good as against the firm is equally good as against the partner: Vezina v. Piche, Q. R. 13 S. C. 213 (1898).

Defect in Title.—The defects in the title of one negotiating a bill, which prevent the person acquiring it with notice from becoming a holder in due course, are set forth in sub-section 2 of the present section. § 29.

ILLUSTRATIONS.

1. The fact that the word "renewal" had been written on the back of a note and erased, was not sufficient notice to prevent an indorsee for value before maturity from becoming a bona fide holder: Larkin v. Wiard, 5 U. C. O. S. 661 (1838).

2. The fact of the name of the maker of the note having been used without authority, is a fact material for the jury to consider in connection with other evidence offered to show that the plaintiff took the note with knowledge of the circumstances: Hanscome v. Cotton, 16 U. C. Q. B. 98 (1857).

3. The maker gave two notes with indorsement on each, "the within note not to be sold," which formed part of the contract. The notes were transferred to plaintiff with the word "not" on one note struck out (which plaintiff noticed on taking the note), and the whole endorsement cut off the other, but without destroying any part of the face of the note. Held, that plaintiff had notice of the defects, was not an innocent holder, and could not recover: Swaisland v. Davidson, 3 O. R. 320 (1883).

4. The fact that a note made by an incorporated company was for the accommodation of another is not sufficient to shift over to plaintiff the onus of proving that he gave value: Merchants Bank v. Ontario Coal Co., 16 Ont. Pr. R. 87 (1894), following re Peruvian Railways Co., L. R. 2 Ch. 617 (1867).

5. A person receiving in good faith, notes before maturity as collateral security without notice of their bogus nature, is not affected by any equities between the original parties: Wood v. Shaw, 3 L. C. J. 169 (1858); Ward v. Quebec Bank, Q. R. 3 Q. B. 122 (1894).

6. Where plaintiff knew when he took the note that it was indorsed for the accommodation of the maker by an agent, who had not the right to do so, he cannot recover from the principal on the indorsement: Reinhardt v. Shirley, Q. R. 6 S. C. 11 (1894).

7. The fact that a bill has been torn and the pieces pasted together again, is a sufficient irregularity to prevent the holder becoming a holder in due course: Ingham v. Primrose, 7 C. B. N. S. 82 (1859). See also Scholey v. Ramsbottom, 2 Camp. 485 (1810); Redmayne v. Burton, 2 L. T. N. S. 324 (1860).

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Defect in title.

8. If facts come to the knowledge of the holder which are such as to raise a suspicion in his mind that there is some defect in the title to the bill, and he makes no further enquiry, he is not a holder in due course: Frey v. Ives, 8 T. L. R. 582 (1892); Banque d' Hochelaga v. Grenier, 3 R. J. 86 (1896).

9. An indorsee who takes a cheque from the payee knowing that the drawer claimed that it had been delivered only conditionally, and that he had stopped its payment, is not a holder in due course: Semple v. Kyle, 4 Rettie (5th series) 421 (1902).

10. Where a mortgage is given to secure payment of a promissory note, the holder who takes it with knowledge of the mortgage, cannot recover on the note more than is due on the mortgage, if the mortgagor is allowed to deal with the original mortgagee without notice of the transfer: Colonial Investment and Agency Co. v. Maxwell, 8 N. Z. L. R. 636 (1890).

11. The erasure of the name of one of the sureties on a note, is an irregularity which should put the purchaser upon enquiry: McCramer v. Thompson, 21 Iowa 244 (1866).

12. The erasure of the indorsement of the payee by a thief, was held to be an irregularity sufficiently patent to have put the purchaser on his guard: Colson v. Arnot, 57 N. Y. 253 (1874).

13. If blanks in a note are filled up by a holder with stipulations repugnant to what was previously written, or erasures are made with like intent, this is a sufficient irregularity to prevent a subsequent holder claiming to be a bona fide holder for value without notice: Angle v. N. W. Mutual Life Ins. Co., 92 U. S. (2 Otto) 330 (1875).

14. Knowledge by a bank that a bill has been accepted for coal to be delivered does not prevent its being a holder in due course, although there is subsequently a failure to deliver the coal: Tradesmen's Nat. Bank v. Curtis, 167 N. Y. 194 (1901).

Title defective in cases specified.

2. In particular, the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill or the acceptance thereof by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud: Imp. Act, s. 29 (2).

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This sub-section does not purport to name all the defects that may be in the title of a person negotiating a bill, but merely gives a number of illustrations of the defects referred to in the first sub-section. A defective title must not be confounded with the case of no title at all, as in the case of a forged indorsement.

The present clause considers the bill with reference to the person responsible for the offences or illegalities mentioned, the next section (30) considers the question of the validity of the bill in the hands of the person who acquires it from him.

Fraud, Duress, or Force and Fear.—When it was decided to extend the Imperial Act to Scotland, the words "force and fear" were added as the equivalent of "duress," which is not used in Scotch law. The corresponding words in the Civil Code of Quebec are "fraud, violence or fear": Art. 991. They are grounds of nullity not only in bills and notes but in all contracts. Such contracts are not absolutely void, they are merely voidable at the option of the party on whom they were practised, or those who are in the exercise of his rights.

Fraud consists in inducing a party to act by some misrepresentation or untrue statement intentionally made for that purpose. Duress may consist in actual violence to the person or in threats thereof. "Violence or fear is a cause of nullity, whether practised or produced by the party for whose benefit the contract is made or by any other person": C. C. Art. 994. The "other unlawful means" referred to, which when employed would vitiate a bill or acceptance obtained thereby and constitute a defect in the title of the party negotiating it, would be means similar to those enumerated. Fraud is never presumed, but must be proved: C. C. Art. 993.

ILLUSTRATIONS.

See also illustrations under section 30, s.-s. 2 and 38 (b).

§ 29.

Fraud, etc.

1. On a settlement, part of the consideration for a note was that certain notes according to a schedule were to be handed over to the maker, and plaintiff fraudulently concealed the fact that he had not all the notes. Held, to be a good defence on the note: McCollum v. Church, 3 U. C. O. S. 356 (1834).

2. When it was alleged that a prior note had been obtained by fraud from the maker, and the note sued on given as a renewal, evidence of the alleged fraud is admissible in the action on the renewal: Dougall v. Post, 5 U. C. Q. B. 554 (1848).

3. Where a note was obtained in exchange for a bill drawn by shippers, but which the latter had no expectation or right to expect would be accepted by reason of their account being overdrawn and notice from the drawees, it was held that the note was obtained by fraud: Gooderham v. Hutchison, 5 U. C. C. P. 241 (1855).

4. Action on a bill drawn by K. upon and accepted by C. and indorsed to plaintiffs. A plea by C. that he was induced to accept by the fraud of the drawers and indorsers, and that it was indorsed to plaintiffs without value, held to be a good defence: Bank of Montreal v. Cameron, 17 U. C. Q. B. 636 (1859).

5. A note was given to the payee and indorser for a share in a company for the sale of a patent alleged to be held by the payee. It was doubtful whether such company ever existed, or the maker of the note ever had a chance to join. Held, that the maker might set up the defence, that it was obtained from him by fraud: Waddell v. Jaynes, 22 U. C. C. P. 212 (1872).

6. A note given to plaintiff in consequence of threats to prosecute the maker for perjury and obtaining money on false pretences, cannot be recovered by him: Canada Farmers' M. Ins. Co. v. Watson, 25 U. C. C. P. 1 (1875).

7. Where defendant's son had committed forgery and the notes sued on were given to plaintiff to prevent the scandal becoming public, they were held to be void: Doyle v. Carroll, 28 U. C. C. P. 218 (1877).

8. Where a husband as the agent of his wife obtained a note by fraud, her title is defective, and a holder for value receiving it after maturity cannot recover: Robertson v. Furness, 43 U. C. Q. B. 143 (1878).

9. The defendant C. being in prison under indictment for assaulting plaintiff, who had also sued him for damages, offered through his counsel, in settlement, an indorsed note for $1,000 which was accepted. The amount was held not to be disproportionate to the injury. The civil action was withdrawn, and the Judge, in view of

the settlement and reparation, inflicted a fine merely for common assault. Held, that there was no fraud, and no duress, and no illegal consideration, as the law had been vindicated: Kneeshaw v. Collier, 30 U. C. C. P. 265 (1879). § 29. Fraud, etc.

10. Plaintiff purchased from an alleged company 15 bushels of hull-less oats at $10 a bushel, and received the company's bond to sell 30 bushels for him at the same price. Defendant bought plaintiff's 30 bushels, giving his note for $300 and getting the company's bond to sell 60 bushels for him. The company sold defendant's notes to plaintiff. Both plaintiff and defendant knew this was only part of a series of transactions and that subsequent parties would be defrauded, the oats being worth no more than ordinary oats. Held, that the transaction was part of a fraudulent scheme, was contrary to public policy, and plaintiff's action properly dismissed: Bonisteel v. Saylor, 17 Ont. A. R. 505 (1890).

11. A master gave a young female servant his note for $1,500 over and above her wages on condition that she would not marry during his lifetime. Held, that the consideration was illegal, as being in restraint of marriage for an unreasonable period: Crowder v. Sullivan, 6 O. L. R. 708 (1903).

12. A son having acknowledged to have taken $25 from plaintiff, the latter by threatening to have the son arrested, induced the mother to give a note for $400. Held, that there was violence, fear and illegal consideration and she was not liable: Macfarlane v. Dewey, 15 L. C. J. 85 (1870).

13. Where a broker obtained a note to be discounted by a solicitor who advanced the money and shared the profits with him, and an attempt was made by the solicitor's firm to garnish the proceeds in the hands of the broker, the solicitor was held not to be a holder in due course, the broker's knowledge being his knowledge. Millar v. Plummer, 22 S. C. Can. 253 (1893).

14. Where a creditor secured secretly the notes of the insolvent for the balance of his claim, it was a fraud on the indorsers of the composition notes, and they were entitled to the benefit of this payment. Arpin v. Poulin, 1 L. N. 290 (1878).

15. Where an illiterate man thought he was making his mark to a receipt, and plaintiff concealed the fact that it was a promissory note, plaintiff cannot recover: Benoit v. Brais, 6 L. N. 342 (1883). Where an educated man admits his signature, but sets up such a claim, he must prove it very clearly: Darling v. McBurney, Q. R. 6 S. C. 357 (1894).

16. An affidavit by defendant that no value was received for a note is irrelevant and useless, and will be rejected on motion: Sanford Co. v.

§ 29. McLaren, Q. R. 4 S. C. 467 (1892); Vallieres v. Baxter, Q. R. 7 S. C. 286 (1894).

17. Where a person takes a note made or indorsed in a partnership name, knowing that it was not made or indorsed for the purposes of the partnership, the onus is cast upon him of showing that the note was signed with the knowledge or assent of every member of the firm: Union Bank v. Bulmer, 2 Man. 380 (1885).

18. A defence that a note was signed under threats of a criminal prosecution, upheld: Commercial Bank v. Rokeby, 10 Man. 281 (1894).

19. Where the drawer of a bill gave it for a special purpose to a party who, instead of using it as directed, negotiated it after maturity, the person so acquiring it is not entitled to recover. Lloyd v. Howard, 15 Q. B. 995 (1850).

20. Where a son forged his father's name to certain notes and discounted them in a bank, the forgeries being discovered, the bank pressed the father to give security, which he did. Held, that the transaction was void on the ground of duress and illegal consideration: Williams v. Bayley, L. R. 1 H. L. 200 (1866).

21. In an action on a note given for the compounding of a prosecution for perjury, it was held, following Ex parte Wolverhampton and S. Banking Co., 14 Q. B. D. 32 (1884), that the consent of the magistrate did not make the transaction a lawful one: Bull v. Copeland, 4 T. L. R. 139 (1887).

Illegal Consideration.—Considerations are illegal which violate the rules of morality, which contravene public policy, or which are prohibited by statute. If part of the consideration of a bill be illegal the instrument is vitiated altogether. A renewal, or the substitution of a new instrument for the old one will not cure the defect.

ILLUSTRATIONS.

See also illustrations under section 30, s-s. 2, and 38 (*b*).

1. An agreement not to proceed in a prosecution for permitting unlawful gambling in a tavern, is an illegal consideration for a note: Dwight v. Ellsworth, 9 U. C. Q. B. 339 (1852).

2. To support a plea that a note was given in consideration of forbearance to proceed in a prosecution for felony, the particular nature of the charge should be proved: Henry v. Little, 11 U. C. Q. B. 296 (1854).

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Illegal considera-tion.

3. A note given in consideration of a charge of felony being not proceeded with in Utah, is void and cannot be recovered on in Ontario: Toponce v. Martin, 38 U. C. Q. B. 411 (1876).

4. It is no defence to an action on a note that the consideration was for pork speculations in Chicago, which are illegal by the laws of Illinois, the contract which was made in Ontario not being against its laws: Bank of Toronto v. McDougall, 28 U. C. C. P. 345 (1877).

5. Defendant, a J.P., was arrested for embezzling fines belonging to the township. Plaintiff gave his note to the township and took the note of defendant and his wife, and the prosecution was abandoned. Held, that the plaintiff was in no better position than the township, and the note was void for illegal consideration: Bell v. Riddell, 2 O. R. 25 (1882); affirmed 10 Ont. A. R. 544 (1885).

6. A note given for an agreement to release from and for stifling a prosecution for defrauding creditors is void: Leggatt v. Brown, 30 O. R. 299 (1899).

7. Promissory notes to creditors for the balance of their claim for signing a deed of composition or discharge are void: Blackwood v. Chinic, 2 Rev. de Leg. 27 (1809); Sinclair v. Henderson, 9 L. C. J. 306 (1865); Decelles v. Bertrand, 21 L. C. J. 291 (1877); Martin v. Poulin, 1 Dorion, 78 (1880); Gervais v. Dube, M. L. R. 6 S. C. 91 (1890); Greene v. Tobin, Q. R. 1 S. C. 377 (1892); Collins v. Baril, ibid.; Ross v. Ross, ibid.; Garneau v. Lariviere, Q. R. 1 S. C. 491 (1892); Fisher v. Genser, Q. R. 15 S. C. 605 (1898); Budden v. Rochon, Q. R. 15 S. C. 322 (1898); Bellemare v. Gray, Q. R. 16 S. C. 581 (1899). Also a renewal of such note: McDonald v. Senez, 21 L. C. J. 290 (1877); Arpin v. Poulin, 22 L. C. J. 331; 1 L. N. 290 (1878); Wilkes v. Skinner, Ramsay A. C. 82 (1882); Bury v. Nowell, Q. R. 10 S. C. 537 (1896). They are void even when given by a third person: Brigham v. Banque Cartier, 30 S. C. Can. 429 (1900), following McKewan v. Sanderson, L. R. 20 Eq. 65 (1875), and Re Milner, 15 Q. B. D. 605 (1885).

8. A note given to raise money for corrupt purposes at an election where the maker was a candidate, is null: Gugy v. Larkin, 7 L. C. R. 11 (1857).

9. A note given as a wager on an election, held to be void: Dufresne v. Guevremont, 5 L. C. J. 278 (1859).

10. Notes given in excess of composition, held not to be void for illegal consideration: Greenshields v. Plamondon, 8 L. C. J. 192 (1860); Perrault v. Laurin, 8 L. C. J. 195 (1863); Martin v. Macfarlane, 1 L. C. L. J. 55 (1865); Bank of Montreal v. Audette, 4 Q. L. R. 254 (1878); Chapleau v. Lemay, 14 R. L. 198 (1886); Lefebvre v. Berthiaume, 18 R. L. 325 (1889); Racine v. Champoux, M. L. R.

§ 29. 6 S. C. 478 (1890); Lamalice v. Ethier, Q. R. 1 S. C. 377 (1890); Tees v. McArthur, 35 L. C. J. 33 (1891).

Illegal consideration.

11. A note of a third party given by an insolvent to a creditor, to obtain his consent to the discharge of the insolvent, is null and void: Prevost v. Pickel, 17 L. C. J. 314 (1872); Leclaire v. Casgrain, M. L. R. 3 S. C. 353 (1887).

12. A trader obtained from his creditors an extension of time, and a party indorsed the last instalment extension notes, on condition that he would pay into a bank a certain sum per week. He made an assignment before the indorsed notes became due, when about half their amount had been deposited. Held, that the consideration was not illegal, and the assignee could not claim this money without relieving the indorser from his liability: Normand v. Beausoleil, 2 Dorion 215 (1882); affirmed, 9 S. C. Can. 711 (1883).

13. A note given to the collector of revenue for a fine is not null, although the fine belongs in part to the provincial treasury: Bois v. Gervais, 10 L. N. 195 (1887).

14. A note given as a subscription to an election fund for provincial elections is null: Dansereau v. St. Louis, 18 S. C. Can. 587 (1890). Also a renewal of such a note: St. Pierre v. L'Ecuyer, Q. R. 23 S. C. 495 (1902).

15. No action lies on a promissory note given by the proprietor of what is commonly termed a "bucket shop" to plaintiff, a customer, in settlement of speculative transactions between them, i.e., speculations on the rise and fall of prices of goods and stocks, without intention of delivery: Dalglish v. Bond, M. L. R. 7 S. C. 400 (1890). See Forget v. Ostigny, [1895] A. C. 318.

16. A note given for smuggled whiskey is null, and where the holder does not make the proof required by clause (b) the action will be dismissed: Banque Jacques Cartier v. Gagnon, Q. R. 5 S. C. 499 (1894).

17. Where a year after a composition, the debtor applied to the creditor for a new credit, and then gave a note for the old unpaid balance there was held to be a valid consideration: Bedard v. Chaput, Q. R. 15 S. C. 572 (1899).

18. A father is liable for his notes given to cover the defalcations of his minor son: Corbett v. Murray, 7 R. J. 203 (1900).

19. A note given for the insurance of the furniture in a house of ill-fame is an illegal and immoral contract, and will not be enforced by the courts: Bruneau v. Laliberte, Q. R. 19 S. C. 425 (1901).

20. A note given in part for illegal sales of liquor is wholly invalid: Smith v. McEachren, 7 N. S. (1 G. & O.) 209 (1868). § 29.

21. A note given to a hotel-keeper in part for liquor is wholly void: Benard v. McKay, 9 Man. 156 (1893).

22. A cheque given in payment of bets on a horse-race is void in hands of a holder for value with notice of the consideration: Woolf v. Hamilton, [1898] 2 Q. B. 337.

23. A promissory note given as collateral security for an illegal contract or agreement, and in effect as part of the same transaction, is tainted with the same illegality, and an action cannot be maintained upon it: Byrne v. O'Callaghan, 13 V. L. R. 924 (1887).

24. It is no defence to an action against an acceptor, that the bill was given for bets on horse races, made by the drawer as his agent, and paid without his request: Oulds v. Harrison, 10 Exch. 572 (1854).

Rights of subsequent holder.

3. A holder, whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder. Imp. Act, s. 29 (3).

It is only one who has been a party to the fraud or illegality, that is precluded from acquiring all the rights and privileges of a holder in due course. Previous notice or knowledge of the original defect in the bill is not sufficient. See Embrey v. Jemison, 131 U. S. 336 (1888).

ILLUSTRATIONS.

1. The indorsee of a note given for lottery tickets, who received it from a bona fide holder for value without notice before maturity, can recover from the maker, even although he knew what the consideration was when he acquired the note: Wallbridge v. Becket, 13 U. C. Q. B. 395 (1855).

2. Where a bona fide holder for value transferred a note to plaintiff, the latter was entitled to recover although he may have known of previous fraud in connection with the note: Clarkson v. Lawson, 14 U. C. Q. B. 67 (1856).

§ 30. 3. B. indorsed a note for C. to renew another note indorsed by him for C.'s accommodation. C. transferred the note for value to plaintiff, who knew no more than that B. was an accommodation indorser; there was no bad faith on plaintiff's part. Held, that he was entitled to recover: Cross v. Currie, 5 Ont. A. R. 31 (1880).

4. A person receiving after its maturity an accommodation note from a holder in due course, may recover from the maker: Pichette v. Lajoie, 10 L. N. 206 (1887).

5. A third party cannot recover from the maker the amount of a promissory note obtained by fraud, if such third party was aware of the fraud before the note was transferred to him, although the transfer was made by an indorser who took it before maturity in good faith and for value: Baxter v. Bruneau, 17 R. L. 359 (1889). Contra, above clause of Act.

6. The indorsee of a note who received it after maturity from a holder in due course, is not affected by the fact that his indorser was aware before he transferred it to the indorsee that it had been issued by a partner in fraud of the partnership. McLeod v. Carman, 12 N. B. (1 Han.) 592 (1869).

7. The indorsee of a bill sues the acceptor who proves that he accepted it for the accommodation of the drawer. This does not make it necessary for the indorsee to prove that he gave value: Mills v. Barber, 1 M. & W. 425 (1836).

8. A partner fraudulently indorses a firm bill to D. for a private debt. F. is aware of the fraud but not a party to it. D. indorses the bill for value to E., who accepts it in good faith. E. indorses it to F., who thereby acquires all E.'s rights. If he gave value for the bill he can sue all parties; if he did not give value, he can sue all except E.: May v. Chapman, 16 M. & W. 355 (1847). See also Masters v. Ibberson, 8 C. B. 100 (1849); Marion Co. v. Clarke, 94 U. S. (4 Otto) 278 (1876).

9. C. by fraud induces B. to make a note in his favor, which he indorses to D. for value without notice. Subsequently D. indorses it back to C. for value. C. cannot collect the note from B.: Sawyer v. Wiswell, 91 Mass. 42 (1864); Andrews v. Robertson, 87 N. W. Rep 190 (Wisc. 1901).

Presumption of value and good faith.

30. Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value:

2. And every holder of a bill is prima facie deemed to be a holder in due course: but if, in an

action on a bill, it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof that he is such holder in due course shall be on him, unless and until he proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course: Imp. Act, s. 30. s. 30.

On whom burden of proof lies.

A party to a bill who disputes his liability on the ground that he is only an accommodation party, or a surety for some other person, should make clear proof of such claim. Even if the bill contain the words "value received" or otherwise declare that value was given, the contrary may be proved by parol: see p. 34. Evidence to rebut the presumption of value must be clear; mere improbability of the existence of a debt is not sufficient: Larraway v. Harvey, Q. R. 14 S. C. 97 (1898). Value is defined in sections 2 and 27, and holder in due course in section 29.

"Illegality" in this section is used as the equivalent of "other unlawful means" and "illegal consideration" in section 29, s-s. 2.

The latter part of sub-section 2 in the Imperial Act reads as follows:—"The burden of proof is shifted unless the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill." There is probably no difference in the effect of the two clauses.

ILLUSTRATIONS.

See illustrations under section 29, s-s. 2, and section 38 (b).

1. Where in an action on a note payable to A. it was proved that B. indorsed it and brought it to A., who indorsed it for his accommodation: Held, that want of consideration could not on these facts be inferred, as between the maker and B., and plaintiff was not obliged to prove consideration: Mair v. McLean, 1 U. C. Q. B. 435 (1841).

§ 30.

Burden of proof.

2. In an action on a note where defendant pleads no consideration, he must impeach it, the plaintiff need not prove it in the first instance: Sutherland v. Patterson, 1 Rob. & Jos. Dig. 511 (1842).

3. Where a note is obtained by fraud or affected by illegality on the part of an indorser, plaintiff must prove that he is a bona fide indorsee for value: Maulson v. Arrol, 11 U. C. Q. B. 81 (1853).

4. Where the indorser indorsed the note while in blank, there being no maker's name, or any sum or payee expressed, and it appeared that the maker's name was afterwards signed without authority; held, that the indorsee suing must shew himself a bona fide holder for value: Hanscome v. Cotton, 15 U. C. Q. B. 42 (1857).

5. The presumption of value having been given recognized by this section is not sufficient to protect an executor who pays notes of the testator, after notice that they were given without consideration, and were intended as gifts to the payees: Re Williams, 27 O. R. 405 (1896).

6. Where defendant swears to fraud he is entitled to unconditional leave to defend, although plaintiff swears he is a holder for value: Farmer v. Ellis, 2 O. L. R. 544 (1901); Flour City Bank v. Connery, 12 Man. R. 305 (1898); Fuller v. Alexander, 47 L. T. N. S. 443 (1882).

7. Proof of fraud in the making of the note, casts upon the holder a third party the burden of showing that he is a bona fide holder for value: Withall v. Ruston, 7 L. C. R. 399 (1857). See also Hunt v. Lee, 2 Rev. de Leg. 28 (1819); Robinson v. Calcott, Ramsay A. C. 83 (1875); Banque Jacques Cartier v. Gagnon, Q. R. 6 S. C. 88 (1894).

8. The presumption created by the words "value received" is not only destroyed by proof that the note was obtained from the maker by fraud, but the presumption then is that the transferee before maturity has not given value and is not owner of the note: Baxter v. Bilodeau, 9 Q. L. R. 268 (1883).

9. Where a note is transferred by indorsement before maturity, but it is proved that it was obtained from the maker by fraud, it does not come under the general rule laid down in Art. 2287 C. C., and the onus of showing that he is in good faith falls upon the holder: Belanger v. Baxter, 6 L. N. 413 (1883).

10. Where a note was obtained from the maker by fraud and without consideration, the holder cannot recover unless he proves that he received the note before maturity, for good and valuable consideration, and in ignorance of the circumstances under which it was given: Dumas v. Baxter, 14 R. L. 496 (1885).

§ 30.

Burden of proof.

11. Where defendant's signature was obtained to a note by fraud, under circumstances which were matter of public notoriety when the note was transferred to B., for whom plaintiff is suing on the note, it must be proved that B. gave value: Exchange Bank v. Carle, M. L. R. 3 Q. B. 61; 31 L. C. J. 90 (1887).

12. Before the Act there was the same presumption in favor of the holder: Bard v. Francoeur, Q. R. 7 S. C. 315 (1894).

13. Defendants proved that the note was for the accommodation of a third party and not authorized; but there was no defence of illegality or fraud. Held, that the onus was not on plaintiffs to prove that they were holders in due course: Farmers' Bank v. Dominion Coal Co., 9 Man. 542 (1893).

14. The holder of a note sues the maker. It is proved that it was given for an illegal consideration. Plaintiff must prove that he gave value: Bailey v. Bidwell, 13 M. & W. 73 (1844).

15. The indorsee of a note sues the maker, who proves that it was given for a wager, which is a consideration void by statute, but not prohibited under a penalty. Plaintiff is not obliged to prove that he gave value: Fitch v. Jones, 5 E. & B. 238 (1855).

16. A firm sued as acceptors prove that it was signed by one partner for a private debt in fraud of the others. Plaintiff must prove that he is a holder for value: Hogg v. Skeen, 18 C. B. N. S. 426 (1865).

17. The owner of a negotiable instrument which has been stolen has no title to it against a bona fide holder for value, although he has prosecuted the thief to conviction: Chichester v. Hill, 52 L. J. Q. B. 160 (1882).

18. Where authority was given to fill in the name of a firm as drawers of a bill, and a partner filled in his own name as drawer and accepted the bill in the firm name in fraud of the partnership, the latter was held not liable, as the holder had not exercised due care and did not prove that he had given value in good faith: Oakley v. Boulton, 5 T. L. R. 60 (1888).

19. Where there was evidence that the acceptor of a bill had handed it to L. to get it discounted for him, but instead of doing so, L. had fraudulently handed it to the drawer, who negotiated it, the burden of proof is on the holder to prove both that value had been given, and that it had been given in good faith without notice of fraud: Tatam v. Haslar, 23 Q. B. D. 345 (1889).

20. Sub-section 2 of section 30 of the Imperial Act does not affect or vary the practice of the Chancery Division in dealing with an

§ 30. application for an injunction to restrain negotiation of a bill of exchange, and an acceptor or holder who applies for an injunction in such a case, even though he alleges fraud, must still be prepared, as formerly, to pay the amount of the bill into court or give security: Hawkins v. Ward, W. N. Nov. 29th, 1890, p. 203. The sub-section relates to the proceedings at a trial, and the shifting of the burden of proof after evidence has been given of fraud, etc.: Hawkins v. Troup, 7 T. L. R. 104 (1890).

Usurious consideration.

3. No bill, although given for a usurious consideration or upon a usurious contract, is void in the hands of a holder, unless such holder had at the time of its transfer to him actual knowledge that it was originally given for a usurious consideration, or upon a usurious contract:

The Imperial Act does not contain any provision similar to this, which is taken in substance from R. S. C. c. 123, s. 17, where however it applied to Ontario alone, having been enacted for Upper Canada when the usury laws were in force there, and not having been repealed before the present Act. There was a similar provision for Quebec in Art. 2335 of the Civil Code. It is now practically obsolete in Canada. The Act, 53 Vict. c. 34. s. 2, which immediately follows the present one in the statutes of 1890, and which came into force on the day of its assent, May 16th, 1890, repealed all the subsisting usury laws which remained in force from old provincial enactments, and which were embodied in the Revised Statutes of Canada as chapter 127, with varying provisions applicable to the provinces of Ontario, Quebec, Nova Scotia and New Brunswick respectively. Now any individual or corporation, in the absence of some special statutory prohibition, may stipulate for, allow, and exact, on bills and notes, or on any other contract or agreement, any rate of interest or discount which is agreed upon: R. S. C. c. 127, s. 1. By sections 80 and 81 of the Bank Act, 53 Vict. c. 31, chartered banks are not allowed to take more than seven per cent. They do not however incur any penalty or forfeiture for usury.

The clause would protect the holder in Canada of a foreign bill, which might have been voided for violation of the foreign usury laws. It will be observed that it is not merely a holder in due course, or even a holder for value that is protected; but any holder who had not at the time of the transfer to him of the bill, actual knowledge of the illegality. § 30.

4. Every bill or note the consideration of which consists, in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or otherwise, in a patent right, shall have written or printed prominently and legibly across the face thereof, before the same is issued, the words "given for a patent right:" and without such words thereon such instrument and any renewal thereof shall be void, except in the hands of a holder in due course without notice of such consideration: For a patent right.

5. The indorsee or other transferee of any such instrument having the words aforesaid so printed or written thereon, shall take the same subject to any defence or set-off in respect of the whole or any part thereof which would have existed between the original parties: Liability of transferee.

6. Every one who issues, sells or transfers, by indorsement or delivery, any such instrument not having the words "given for a patent right" printed or written in manner aforesaid across the face thereof, knowing the consideration of such instrument to have consisted, in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or otherwise, in a patent right, is guilty of a misdemeanor, and Penalty.

§ 30. liable to imprisonment for any term not exceeding one year, or to such fine, not exceeding two hundred dollars, as the court thinks fit. R. S. C. c. 123, ss. 12, 13, 14.

For a patent right.

These provisions are not in the Imperial Act and were not in the bill as introduced into the House of Commons, but were reluctantly inserted by the Minister of Justice at the urgent request of certain members of that House: Commons Debates, 1890, pp. 105, 1415 and 1520. The first Canadian statute on the subject was passed in 1884, 47 Vict. c. 38, and embodied the above clauses, with the exception of that part of sub-section 4, following the words "given for a patent right," which declare that any such bill or note not bearing the prescribed words, and any renewal thereof, shall be void, except in the hands of a holder in due course without notice of such consideration. These words were added to the clause to override the interpretation placed upon the original Act as embodied in R. S. C. c. 123, by the Ontario Common Pleas Divisional Court in the case of Girvin v. Burke. 19 O. R. 204 (1890), a decision which was rendered while the Bill was before Parliament: Senate Debates, 1890, p. 465. In that case it was held, that the omission of the prescribed words in a note or renewal note did not render it void as between the maker and the payee, and that the intention of the Act was to give the indorsee or transferee notice, and to put him in the position of the payee as to any defence which the maker might have against a claim by the payee. In this the Court followed a decision in Pennsylvania on a similar statute: Haskell v. Jones, 86 Penn. St. 173 (1878); where Chief Justice Sharswood said: "By the express provisions of the statute the only effect of the insertion of such words, is that such note or instrument in the hands of the purchaser or holder, shall be subject to the same defence as if in the hands of the original owner or holder."

In Johnson v. Martin, 19 Ont. A. R. 594 (1892), it was held that an indorsee for value before maturity who took a

note given for a patent without these words, with knowledge of the consideration, could not recover. § 30.

For a patent right.

As to what notice prevents a holder for value from becoming a holder in due course, see Banque d'Hochelaga v. Menier, 3 R. J. 86 (1896).

A creditor of a patentee induced a third party to purchase a half-interest in the patent for $700, and to join the patentee in a note for $1,000, the creditor giving the latter $200 as an inducement. The note was held to be void as to the third party for want of the words "given for a patent right": Craig v. Samuel, 24 S. C. Can. 278 (1895); reversing Samuel v. Fairgrieve, 21 Ont. A. R. 419 (1894).

Plaintiff moved for summary judgment on a promissory note. Defendant put in an affidavit that the consideration was to plaintiff's knowledge a patent right. Plaintiff denied this. Held, that defendant was entitled to unconditional leave to defend: Davey v. Sadler, 1 O. L. R. 626 (1901).

Under a statute on this subject where the rights of a holder in due course were not in express terms protected, as they are in our Canadian Act, it was held that if the patent right consideration were not expressed in the note, a bona fide holder would be protected according to the general principles of the law merchant: Palmer v. Minar, 8 Hun (N. Y.) 342 (1876).

The general purpose of the Act is to restrict its provisions to the civil rights and remedies relating to bills and notes. This is adhered to in every other section, and provisions for the punishment of the forgery of bills and other frauds in connection with them, have not been inserted in the Act, but are to be found among the criminal statutes. Sub-section 6 is the only exception to this rule. This led to the further anomaly of the insertion of the word "note" in this part of the Act which relates to bills of exchange, instead of leaving it to the operation of section 88, as it was not thought desirable to leave a criminal offence to implication, or the operation of incidental legislation: Senate Debates, 1890, p. 464.

§ 31.

NEGOTIATION OF BILLS.

Sections 31 to 38 inclusive treat of the negotiation of bills. The Act only treats of the negotiation or transfer of bills according to the law merchant, that is, by delivery when a bill is payable to bearer, and by indorsement and delivery when it is payable to order.

Other methods by which negotiable bills may be transferred, or the methods by which non-negotiable bills may be transferred, are not considered at all. These are left to the operation of the ordinary laws. It is to be observed that by none of these other methods can a transferee become a holder in due course or acquire greater rights than were possessed by the transferrer.

Thus bills, whether negotiable or non-negotiable, may pass by death, by assignment in bankruptcy, by ordinary execution, by gift, by donatio mortis causa, or by any method recognized by the law of any of the provinces.

Negotiation of bills.

31. A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill: Imp. Act, s. 31 (1).

"Holder" has been defined in section 2 as the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof. He need not be the owner, he may have it merely for discount, collection or the like, or may even hold it unlawfully; so that the negotiation of a bill or note is not necessarily a sale of the instrument, but may be a pledging or a mere transfer of possession, provided the transferee is in a position thereby to acquire the status of a holder as above defined. As to the rights of a holder, see section 38.

The delivery of the note of a third party to the payee is not a negotiation of it. The note is then "issued," but cannot properly be said to be "negotiated": Herdman v. Wheeler, [1902] 1 K. B. 361.

In Crouch v. Credit Foncier, L. R. 8 Q. B. (1873), at p. 381, Lord Blackburn speaks of negotiation as follows:— "In the notes to Miller v. Race in Smith's Leading Cases, where all the authorities are collected, the very learned author says: 'It may therefore be laid down as a safe rule, that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it pro tempore, then it is entitled to the name of a negotiable instrument, and the property in it passes to a bona fide transferee for value, though the transfer may not have taken place in market overt.' Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word." See also Wookey v. Pole, 4 B. & Ald. at p. 10 (1820); and Swan v. N. B. Australasian Co., 2 H. & C. at p. 184 (1863). § 31.

Where a merchant in London, England, drew upon a firm in Toronto, who accepted payable in London, it was held that the bill was not negotiated in Upper Canada within the meaning of the statute 12 Vict. c. 76: Foster v. Bowes, 2 U. C. P. R. 256 (1857).

A bill of exchange cannot be said to be "negotiated," within the meaning of the law merchant, so long as it remains in the ownership or possession of the payee: Hall v. Cordell, 142 U. S. 116 (1891); Blakiston v. Dudley, 5 Duer (N. Y.), 373 (1856).

2. A bill payable to bearer is negotiated by delivery: Imp. Act, s. 31 (2); C. C. 2286. To bearer

A bill is payable to bearer when it is expressed to be so payable, or when the only or last indorsement is in blank, section 8, s-s. 3. Delivery means the transfer of possession, actual or constructive, from one person to another: section 2. As to the conditions under which a valid delivery takes place, see section 21. Where the holder of a bill payable to bearer, negotiates it by delivery without indorsing it, he is called a "transferrer by delivery": section 58. See that

§ 31. section and the notes thereon as to liability of a person who negotiates a bill by delivery. The holder of a bill payable to bearer may indorse it before delivering it, and he then becomes an indorser and liable as such, but in such a case the indorsement is no part of the negotiation but precedes it: section 56.

To order.

3. A bill payable to order is negotiated by the indorsement of the holder completed by delivery: Imp. Act, s. 31 (3); C. C. 2286.

A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer, or indicating an intention that it should not be transferable: section 8, s-s. 4. The conditions necessary to a valid indorsement are set out in section 32 and the different kinds of indorsement in sections 34 and 35. The indorsement and delivery must be by the same person. The delivery in order to be effectual must be made either by or under the authority of the party indorsing: section 21, s-s. 2 (*a*). Where the payee of a note indorsed it in blank before his death, and his executrix delivered it to plaintiff, it was held that the latter could not recover: Bromage v. Lloyd, 1 Ex. 32 (1847); Clark v. Boyd, 2 Ohio 56 (1825); Clark v. Sigourney, 17 Conn. 511 (1846).

Quebec notarial note.

In Quebec a promissory note executed before notaries and payable to order, is negotiable by indorsement in the ordinary way: Morrin v. Legault, 3 L. C. J. 55 (1859). It may be negotiated by special indorsement, but not by an indorsement in blank: Brunet v. Lalonde, 16 L. C. R. 347 (1866). But held later by the Court of Review that such instruments are ordinary promissory notes: Aurele v. Durocher, 5 R. L. 165 (1873).

Negotiation in this sub-section is a transfer by the law merchant, and has no reference to a transfer that may take place in various other ways, as by sale and assignment, by transmission, by death, by will, or by gift.

A bill of exchange was indorsed to the order of the Bank of Nova Scotia at Amherst, and by the agent at Amherst to the order of the Bank of Nova Scotia at Halifax "for collection." It was dishonored by non-payment and returned to the agent at Amherst, who sold it to L. without indorsing it. L. was sued by the assignee of the drawers, and pleaded the bill by way of set-off. Held, that he could not do so without indorsement: Forsyth v. Lawrence, 19 N. S. 148; 7 C. L. T. 174 (1886). § 31. Indorsement.

Plaintiff sued on notes alleging himself to be the holder. The payee had indorsed them, but his indorsement was erased. Held, that plaintiff had shown no title. Hempsted v. Drummond, 10 L. C. R. 27 (1859).

On the death of the holder of a bill payable to his order all his rights pass to his executors or personal representatives, who may negotiate it by indorsement: Robinson v. Stone, 2 Str. 1260 (1746). So also if a bill be made payable to a dead man in ignorance of his death: Murray v. E. I. Co., 5 B. & Ald. 204 (1821).

4. Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferrer had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferrer: Imp. Act, s. 31 (4). Without indorsement.

Such transfer may be made to a purchaser or to a pledgee. While the bill remains payable to the order of the transferrer, the transferee is not the holder of the bill, even if he has given full value for it. Even if he receive it before maturity, he cannot become a holder in due course, and does not acquire a better title than the transferrer had. He holds the bill subject to any defect of title in the transferrer, of which he becomes aware before the indorsement of the bill to him, and if it is not indorsed before maturity, it is subject to any defects of title that existed in the transferrer. This

§ 31.

Without indorsement.

is in accordance with principle. In the interest of commerce, the law makes an exception to the general rule, which is that no person can give to another greater rights than he himself has. This exception being part of the law merchant, it applies only where a transfer takes place according to the law merchant, and the law merchant does not recognize any transfer of a bill payable to order, except by indorsement.

In a Scotch case where the payee of a bill transferred it for value without indorsing it, it was held that the transferee was entitled to recover from the acceptor: Hood v. Stewart, 17 Court of Session Cases, 749 (1890).

In a Quebec case, Dupuis v. Marsan, 17 L. C. J. 42 (1872), it was held that the transferee of a note for $35 payable to order, could become the holder without indorsement by the payee, and that he might prove the transfer by parol under Art. 1233 of the Civil Code, which says that proof may be made by testimony in all matters in which the sum in question does not exceed $50. In another Quebec case it was held, that where the payee of a note, payable to order, gave it without indorsing it as collateral security to a creditor, and the payee became insolvent and his whole estate was sold by the assignee to the creditor who held the note, such sale and transfer was equivalent to indorsement, and he could collect from the maker: Guerin v. Orr, 5 L. N. 379 (1882). The former of these decisions at least, is not in accordance with the present Act, or indeed with Article 2286 of the Civil Code.

Where the maker of a promissory note payable to his own order, transferred it for value without indorsing it, he was held liable to the transferee, and a judgment ordering him to indorse it held to be superfluous: Coutu v. Rafferty, M. L. R. 7 S. C. 146 (1891). In this case indorsers were held liable without protest as indorsers "pour aval"; but one of them appealed, and it was held that the instrument was not really a promissory note and he was not liable: Trenholme v. Coutu, Q. B. 2 Q. B. 387 (1893. Where a note is

not indorsed by the payee the presumption is that it is still his property: Demers v. Hogle, Q. R. 7 S. C. 476 (1895). § 31.

If the transferrer refuses to indorse the bill, the transferee has a right of action to compel him: Ex parte Greening, 13 Ves. 206 (1806); Day v. Longhurst, 62 L. J. Ch. 334 (1893). If he should die before indorsing, his personal representatives would be subject to the same obligation. Where such indorsement has been omitted by mistake, the transferee has not the right to sign the name of the transferrer in order to perfect his title: Harrop v. Fisher, 10 C. B. N. S. 196 (1861). Right to compel indorsement.

A payee who has transferred for value without indorsing may be made a party: Vandal v. Domville, 20 R. L. 305 (1890).

A promissory note was transferred by delivery to the plaintiffs by way of pledge to secure repayment of an advance. There was no intention on the part of the transferrer to transfer the whole of his rights in the note, nor to indorse it. It was held that the plaintiffs could not recover from the maker: Good v. Walker, 61 L. J. Ch. 736 (1892).

5. Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability. Imp. Act, s. 31 (5). Personal liability avoided.

This sub-section would be applicable where bills or notes were made payable to the order of persons, who died or lost their capacity before indorsing them, when executors, administrators, tutors or curators would require to do so. Indorsing in such capacity would ordinarily relieve them from personal liability: section 26; but it would be prudent in these cases to add such words as "without recourse" or "without recourse to me personally": section 16; Ex parte Mowbray, 1 Jac. & W. 428 (1820); Watkins v. Maule, 2 Jac. & W. 243 (1820).

§ 32.

Requisites of a valid indorsement.

32. An indorsement in order to operate as a negotiation must comply with the following conditions, namely:—

(*a*) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient; Imp. Act, s. 32 (1).

According to sub-section 3 of section 31 a bill payable to order is negotiated by the indorsement of the holder completed by delivery. The present section sets out the conditions of such an indorsement. In the first place it must be "written." This as we have seen, according to the Interpretation Act, R. S. C. c. 1, s. 7 (23), includes words printed, painted, engraved, lithographed or otherwise traced or copied. A stamp is frequently used by banks and other corporations, so that the only writing is the signature of the officer who executes it. The indorser need not sign with his own hand; his signature may be written by some one authorized by him: sections 25 and 90. The indorsement and signature may be in pencil: ante, p. 36. As to what is sufficient signature, see page 37.

Indorsement in its literal sense means writing one's name on the back of the bill, but the indorsement may be on any part of it, even on the face: Young v. Glover, 3 Jur. N. S. Q. B. 637 (1857); Ex parte Yates, 2 De G. & J. 191 (1858); Carrique v. Beaty, 28 O. R. 175 (1896); Arnot v. Symonds, 85 Penn. St. 99 (1877). Where a person signs a bill otherwise than as a drawer or acceptor, he is liable as an indorser: section 56.

Not an indorsement

An agreement in writing to indorse a bill is not an indorsement: Rose v. Sims, 1 B. & Ad. 521 (1830); Harrop v. Fisher, 10 C. B. N. S. at p. 204 (1861). Nor is the assignment of a bill by a separate writing: Re Barrington, 2 Scho. & Lef. 112 (1804); Ex parte Harrison, 2 Brown C. C. 615 (1789). The latter may be a transfer of all the rights of the holder to the transferee, but it does not operate as a

commercial negotiation under the law merchant, to which the law accords special privileges, one of them being that the holder may give to his transferee greater rights than he himself has, when the latter is in the position to become a holder in due course. § 32.

ILLUSTRATIONS.

1. The holder of a note writes on the back, "I bequeath—pay the within to D. or his order at my death," signs it and gives it to D. This is not an indorsement: Mitchell v. Smith, 33 L. J. Ch. 596 (1864).

2. The following on the back of bills and notes over the signature of the indorser has been held to be a valid indorsement:—"I hereby sell and assign all my interest in the within note to B." Sears v. Lantz, 47 Iowa 658 (1878); Shelby v. Judd, 24 Kansas, 161 (1880); Hatch v. Barrett, 34 ibid. 223 (1885).

3. In Michigan it has been held that the words, "I transfer my right, title and interest in the within note to Y." over the signature of the indorser on the back of a note, do not operate as a commercial indorsement, but only as an ordinary assignment, and if for value before maturity, do not give the transferee any higher or greater rights than the transferee possessed: Aniba v. Yeomans, 39 Mich. 171 (1878). This has been criticized and not followed in other States: 1 Daniel, § 688b.

An indorsement written on an allonge, or on a "copy" of a bill issued or negotiated in a country where "copies" are recognized, is deemed to be written on the bill itself; Imp. Act, s. 32 (1). Allonge.

An allonge (literally lengthening or elongation) is a paper attached to the bill to receive indorsements, when there is no longer room for them on the back of the bill itself.

Copies of bills are not used in England, Canada or the United States; but on the continent of Europe, where the practice of drawing bills in sets is not followed, copies are sometimes used for convenience of transfer while the original is being forwarded for acceptance: Nouguier, § 208.

§ 32.

No partial indorsement.

(*b*) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill: Imp. Act, s. 32 (2).

There may be a partial acceptance of a bill: section 19, s-s. 2 (*b*). An indorsement of such a bill would be valid, as it would be an indorsement of the entire bill as accepted. An indorsement of part of the bill does not constitute the indorsee a holder or give him the rights of a holder. A person who has made himself liable on a bill cannot be compelled to defend two actions on it instead of one. See Hawkins v. Cardy, 1 Ld. Raym. 360 (1704); Jones v. Broadhurst, 9 C. B. 173 (1850); Heilbut v. Nevill, L. R. 4 C. P. at p. 358 (1869); Miller v. Bledsoe, 2 Ill. 530 (1838).

All must indorse.

(*c*) Where a bill is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others: Imp. Act, s. 32 (3).

This clause is an example of the custom of merchants having overcome the law as laid down by the judges. In the case of Carvick v. Vickery, 2 Douglas 653 n. (1781), action was brought upon a bill drawn by two persons, not partners, payable "to us or our order," and indorsed by only one of them in his own name. The full Court unanimously set aside a nonsuit, Lord Mansfield remarking that the drawers by making the bill payable "to our order" had made themselves partners as to this transaction. At the new trial the defence stated and offered to prove, that by the universal usage and understanding of all the bankers and merchants in London, the indorsement was bad, because not signed by both

payees. The jury, una voce, declared they knew it perfectly to be as stated, and without hearing a witness found a verdict for defendant. § 32.

Where one party has the authority of the other and indorses in his name, it is in effect indorsed by both, so this is no exception. In the case of a partnership, a partner is presumed to have authority to indorse a bill payable to the order of the firm.

2. Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described, adding his proper signature; or he may indorse by his own proper signature: Imp. Act, s. 32 (4). Misspelling.

In the Imperial Act when a payee or indorsee is wrongly designated or his name is misspelt, and he indorses the bill as described, he may or may not, at his option, add his proper signature, the words "if he thinks fit" being inserted after the word "adding." These words were struck out in the Senate on the ground that if a person indorsed a bill otherwise than regularly in his own name, he should be required to add his proper signature: Senate Debates, 1890, p. 362. They were however allowed to stand in a similar clause as to the acceptor, section 17, s-s. 3, so that an acceptor under similar circumstances is not obliged to add his proper signature. If he should indorse a bill by such wrong name or designation alone, it would no doubt be held to be a valid negotiation of the bill, as he would be presumed to have adopted that as his proper name.

It can perhaps hardly be said that there is any very well settled rule as to the manner in which indorsements should be made. It is important that the signature would follow as closely as practicable the form of the name as given in the **Manner of indorsement.**

§ 32. bill or special indorsement. The following will probably be found to be in accordance with the best commercial usage:—

Use the Christian name or initials as in the bill or special indorsement if there be no mistake in the name as there given and no misspelling, dropping all prefixes and suffixes such as "Mr.," "Mrs.," "Miss," "Messrs.," "Hon.," "Esq.," etc. Where for the purpose of identification, an addition follows, such as "merchant," "M.D.," "M.P.," "K. C.," or the like, it may be well to add this to the signature. A bill to the order of Mrs. John Smith may be indorsed "Mary Smith, wife of John Smith"; or a bill "to the estate of John Jones, or order," by "A. B., executor or administrator late John Jones"; a bill "to the order of the City Treasurer, Toronto," by "A. C., City Treasurer, Toronto"; a bill to the order of "The Canada Gas Co.," by "The Canada Gas Co., per E. F., Manager"; a bill "to the order of John Smith & Co.," if by a partner, should be indorsed simply "John Smith & Co.," and if by another person authorized by the firm "John Smith & Co., per G. H., Atty.," or "per pro. G. H."

Signatures such as the following should be avoided, partly on the ground of ambiguity, and partly on account of the danger of the agent or representative making himself personally liable:—"A. B., agent for C. D.," "Per proc. E. F., G. H.," "J. K., for the L. M. Co.," "J. K., for L. M. & Co." "J. K., for the estate of L. M."

Order of indorsement.

3. Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved; Imp. Act, s. 32 (5).

Each indorser undertakes to compensate the holder or subsequent indorser who is compelled to pay the bill: section 55, s-s. 2. As between themselves they may agree that the liability shall not exist or even that it may be reversed, but such an agreement would not affect the bona fide holder

a note who may treat the prior parties as liable in the order in which they stand on the note, although a contrary agreement, of which he was aware when he took it, may exist between the parties: Elder v. Kelly, 8 U. C. Q. B. 240 (1850); McLean v. Garnier, 14 N. S. (2 R. & G.) 432 (1881). § 33.

This agreement may be proved by parol: Wordsworth v. McDougall, 8 U. C. C. P. 403 (1858); Day v. Sculthorpe, 11 L. C. R. 269 (1861); Leveille v. Daigle, 2 Dorion, 129 (1880); Willett v. Court, 6 L. N. 204 (1883); Scott v. Turnbull, ibid, 397 (1883); Deschamps v. Leger, M. L. R. 3 S. C. 1 (1886); Wilders v. Stevens, 15 M. & W. 208 (1846); Coolidge v. Wiggin, 62 Me. 568 (1873).

4. An indorsement may be made in blank or special. It may also contain terms making it restrictive. Imp. Act, s. 32 (6). Special indorsement.

For indorsements in blank and special indorsements, see section 34. For restrictive indorsements, see section 35.

33. Where a bill purports to be indorsed conditionally, the condition may be disregarded by the payer, and payment to the indorsee is valid, whether the condition has been fulfilled or not. Imp. Act, s. 33. Conditions of indorsements.

An absolute indorsement is one by which the indorser binds himself to pay, upon no other condition than the failure of prior parties to do so, and due notice to him of such failure, and protest when required by law. A conditional indorsement is one by which the indorser annexes some other condition to his liability. Sometimes the condition is precedent and sometimes subsequent. Thus, "Pay to A. or order if he lives until he is 21," or "if he is alive when the bill becomes due," is an indorsement upon a condition precedent. "Pay to A. or order, unless before payment I give you notice to the contrary," is upon a condition subsequent. A condition attached to the indorsement does not restrain the negotiability of the bill.

s. 34.

This section alters the law. In England, where the acceptor of a bill paid the indorsee who held under a conditional indorsement, the condition not having been fulfilled, he was obliged to pay a second time: Robertson v. Kensington, 4 Taunt. 30 (1811); Savage v. Aldren, 2 Stark. 232 (1817). In Quebec the same rule prevailed: "An indorsement may be restrictive, qualified or conditional, and the rights of the holder under such indorsement are regulated accordingly": C. C. Art. 2288.

The new rule is much more equitable, as it was manifestly unfair to impose, for example, the duty upon an acceptor of determining whether or not a condition that had been placed upon the bill after his acceptance, and by parties of whom he might know nothing, had been fulfilled. By paying he ran the risk of being compelled to pay a second time; by refusing, his paper would go to protest, and he be exposed to costs.

It is to be observed that the section does not give the holder the right to compel payment if the condition is not fulfilled, it only discharges the person who pays. If the condition is not fulfilled the holder who receives payment may be responsible to the prior indorser who made the conditional endorsement.

A bill of exchange must be unconditional: sections 3 and 11, s-s. 2; an acceptance like an indorsement may be conditional: section 19, s-s. 2 (*a*).

Indorsement in blank.

34. An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer: Imp. Act, s. 34 (1).

An indorsement in blank consists simply of the signature of the indorser. When so indorsed it may be negotiated by delivery: section 31, s-s. 2, unless or until the blank indorsement is converted into a special indorsement: section 34, s-s. 4.

§ 34.

The rule of this sub-section has long been recognized as law in England: Peacock v. Rhodes, 2 Douglas, 633 (1781).

By the old French law indorsements in blank were not recognized: Pothier, Change, No. 38; nor are they now except as "procurations" and not as negotiations of bills, the holder being merely the agent of the indorser: Code de Com. Arts. 137, 138. In Lower Canada the old French law was modified by 17 Geo. III. c. 2, which allowed notes of bankers, merchants and traders to be indorsed in blank. A tavern-keeper's note was held to be within the Act: Patterson v. Welsh, 2 Rev. de Leg. 30 (1819); McRoberts v. Scott, 2 Rev. de Leg. 31 (1821); and it was held that only bankers, merchants and traders could indorse in blank: Bank of Montreal v. Langlois, 3 Rev. de Leg. 88 (1847). By 12 Vict. c. 22, s. 1, it was enacted that any bill or note payable to the order of any person might be indorsed in full or in blank, and this was embodied in the Civil Code as Article 2286.

2. A special indorsement specifies the person to whom, or to whose order, the bill is to be payable: Imp. Act, s. 34 (2). Special indorsement.

A special indorsement or indorsement in full is so called because the indorser not only signs his name but states in whose favor the indorsement is made. It may be in any of the following forms: "Pay to A. B.," which gave the right to negotiate the bill while a bill in that form was not negotiable: Edie v. East India Co., 2 Burr. 1216 (1761); or "Pay to A. B. or order"; or "Pay to the order of A. B.," which last is equivalent to the preceding, as it enables A. B. to demand payment without indorsing, or to indorse the bill at his option: section 8, s-s. 5. See Soares v. Glyn, 8 Q. B. 24 (1845); Harmer v. Steele, 4 Ex. 15 (1849); Robarts v. Tucker, 16 Q. B. 579 (1851); Law v. Parnell, 7 C. B. N. S. 285 (1859).

A French indorsement must be dated, must declare how value has been given, and give the name of him in whose favor it is made: Code de Com. Art. 137.

§ 34.

Application of Act to indorsee.

3. The provisions of this Act relating to a payee apply, with the necessary modifications, to an indorsee under a special indorsement: Imp. Act, s. 34 (3).

Each indorsement is like a new drawing of the bill; if in blank, it is as if the new drawing were in favor of bearer; if special, as if it were in favor of the indorsee. The chief provisions of the Act made applicable to an indorsee by this clause are that he must be named or clearly indicated by his office or otherwise, that a bill may be indorsed to two or more indorsees jointly, or to one of two or more, and that the indorsee may either demand payment of the bill himself or again indorse it specially or in blank: sections 7 and 8.

Conversion of blank indorsement.

4. Where a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person. Imp. Act, s. 34 (4).

If the holder make the bill payable to himself he must indorse it, in order to negotiate it; he may however by writing over the signature of the last indorser the direction that it be paid to another person, do so without making himself liable as an indorser: Vincent v. Horlock, 1 Camp. 442 (1808); Hirschfield v. Smith, L. R. 1 C. P. 340 (1866). In such a case the indorsee takes the bill as specially indorsed to him by the last indorser, and the person giving him the bill would incur the liability only of a transferrer by delivery.

The person in possession of a French bill indorsed in blank may, if he has given value, in the same manner complete the indorsement in his own favor, and so constitute himself a holder of the bill: Nouguier, §§ 747, 748.

If there are several blank indorsements the holder may convert the first into a special indorsement with-

charging the subsequent indorsers: Bank of British N. A. v. Ellis, 2 Federal Reporter, 46 (1880). § 35.

Striking out Indorsements.—A holder may not only convert a blank indorsement into a special one, but he may also strike out any number of blank indorsements. Any indorser subsequent to one struck out is discharged: Wilkinson v. Johnson, 3 B. & C. 428 (1824); Mayer v. Jadis, 1 M. & Rob. 247 (1833). He cannot strike out special indorsements, through which he has to make title. He cannot strike out a special indorsement and insert his own name: Porter v. Cushman, 19 Ill. 572 (1858). The former Quebec rule is found in Article 2289 C. C. Indorsements for collection may be struck out by the owner of the bill, and its possession after dishonor by an indorser with his special indorsement struck out, is prima facie evidence that he took up the bill on its dishonor, although there was no re-indorsement to him: Black v. Strickland, 3 O. R. 217 (1883); Callow v. Lawrence, 3 M. & S. 95 (1814).

35. An indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if a bill is indorsed "Pay D. only," or "Pay D. for the account of X.," or "Pay D., or order, for collection": Imp. Act, s. 35 (1). Restrictive indorsement.

A restrictive indorsement indicates that the indorsee is merely an agent to receive the money, and that he is not a purchaser of the bill. He cannot pledge or sell the bill except in the case mentioned in sub-section 3 of this section, and all subsequent indorsees are subject to the same restriction.

An indorsement in favor of a person named, as "Pay D." was not restrictive before the Act, when the same words in the body of a bill or note would have rendered it not

§ 35.

Restrictive indorsement.

negotiable: Acheson v. Fountain, 1 Str. 557 (1723); Edie v. E. I. Co., 2 Burr. 1227 (1761); Cunliffe v. Whitehead, 3 Bing. N. C. 829 (1837); Gay v. Lander, 6 C. B. 336 (1848). An acceptance "in favor of D. only," is not a qualified acceptance: Meyer v. Decroix, [1891] A. C. 520. The meaning of adding the word "only" in the acceptance in that case was that it was a bill of which D. was the only drawer: per Lord Esher, 2[illegible] Q. B. D. at p. 348. The adding of the word, however, in an indorsement makes it restrictive according to this section. The examples given are not the only words that render an indorsement restrictive, any others which show that the indorsee is not a purchaser of the bill are equally effective. Where a wife, separated from her husband, received notes of third parties in settlement of the amount to be paid to her, with the indorsement that they were not to be sold, her indorsee could not recover on them: Wilson v. McQueen, Rob. & Jos. Ont. Digest, 491 (1840). A method adopted by some with cheques about to be deposited in a bank is to indorse them "For deposit only," to prevent any person acquiring them in good faith, in case they should be lost or stolen before reaching the bank.

Even if the indorsee, under a restrictive indorsement, has given full value, he cannot sue the indorser on the bill: Williams v. Shadbolt, 1 C. & E. 529; 1 T. L. R. 417 (1885); White v. National Bank, 102 U. S. (12 Otto) 658 (1880); Third Nat. Bank v. Nat. Bank, ibid. 633 (1880).

ILLUSTRATIONS.

The following are examples of the restrictions referred to in this section:

1. "Pay D. only": Byles, p. 186; Randolph, § 725.

2. "Pay D. for the account of X.," or "for my use," or "for the use of X.," or the like: Cramlington v. Evans, 2 Ventris 307 (1687); Snee v. Prescott, 1 Atk. 247 (1743); Archer v. Bank of England, 2 Douglas, 637 (1781); Treuttel v. Barandon, 8 Taunt. 100 (1817); Lloyd v. Sigourney, 5 Bing. 525 (1829); Wedlake v. Hurley, 1 C. & J. 83 (1830); Wilson v. Holmes, 5 Mass. 543 (1809); Blaine v. Bourne, 11 R. I. 119 (1875); Hook v. Pratt, 78 N. Y. 371 (1879); White v. National Bank, supra; First Nat. Bank v. Reno Co. Bank, 3 Fed. Rep. 257 (1880).

3. "Pay D. or order for collection": Williams v. Shadbolt, 1 C. & E. 529 (1885); Sweeney v. Easter, 1 Wall. 166 (1863); Merchants' Bank v. Hanson, 33 Am. Rep. 5 (1884). § 35.

The holder under a restrictive indorsement cannot strike out indorsements on the bill: C. C. Art. 2289; Barthe v. Armstrong, 5 R. L. 213 (1869); Mayer v. Jadis, 1 M. & Rob. 247 (1833).

An indorsement is not restrictive on account of its containing a statement of the transaction out of which it arose: Potts v. Reed, 6 Esp. 57 (1806); or of being for "value in account with A.": Murrow v. Stuart, 8 Moore P. C. 267 (1853); Buckley v. Jackson, L. R. 3 Ex. 135 (1868).

2. A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorizes him to do so: Right of indorsee thereunder.

3. Where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement. Imp. Act, s. 35 (2) (3). If further transfer authorized

If the restrictive indorsement be in favor of the indorser "or order." this gives him authority to transfer the bill, but always subject to the same restriction as in the indorsement to himself: Munro v. Cox, 30 U. C. Q. B. 363 (1870); Lloyd v. Sigourney, 5 Bing. 525 (1829).

The relation between the restrictive indorser and indorsee is that of principal and agent, so that if the acceptor pay the indorser the indorsee cannot recover from him, although he may have given value for the bill. Williams v. Shadbolt, 1 C. & E. 529 (1885). Such indorser is sometimes spoken of as a trustee, but this is true only so far as an agent or bailee

§ 36. is a trustee: Cook v. Lister, 13 C. B. N. S. 597 (1863); Re Hallett's Estate, 13 Ch. D. 708 (1879).

In some of the United States a restrictive indorsee cannot sue in his own name: Rock Co. Nat. Bank v. Hollister, 21 Minn. 385 (1875); Iselin v. Rowlands, 30 Hun (N. Y.) 488 (1883).

When negotiable bill ceases to be so.

36. Where a bill is negotiable in its origin, it continues to be negotiable until it has been (*a*) restrictively indorsed, or (*b*) discharged by payment or otherwise: Imp. Act, s. 36 (1).

A bill is not negotiable in its origin which contains words prohibiting transfer, or indicating an intention that it should not be transferable. A bill negotiable in its origin is one made payable to bearer, or to a particular person or to his order: section 8.

As to what is a restrictive indorsement, see section 35. Under the Quebec Civil Code, which recognized restrictive indorsements, it was provided by Art. 2288, that "no indorsement other than that by the payee can stop the negotiability of the bill." A cheque payable to C. M. & S. or bearer, was indorsed by them and stamped for deposit to their credit in the bank where they kept their account. Their clerk, instead of depositing it, took it to the bank on which it was drawn and the teller paid it without noticing the writing on the back. It was held, that such a cheque could not be restrictively indorsed: Exchange Bank v. Quebec Bank, M. L. R. 6 S. C. 10 (1890).

Negotiation of overdue bill.

2. Where an overdue bill is negotiated, it can be negotiated only subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which had the person from whom he took it: Imp. Act, s. 36 (2).

Overdue.—A bill payable on demand is deemed to be overdue when it appears on its face to have been in circulation for an unreasonable length of time: section 36, s-s. 3. A note payable on demand is not deemed to be overdue for the purpose of this sub-section by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue: section 85, s-s. 3. A time bill or note is over due after the expiration of the last day of grace: Leftley v. Mills, 4 T. R. 170 (1791). § 36. Overdue bill.

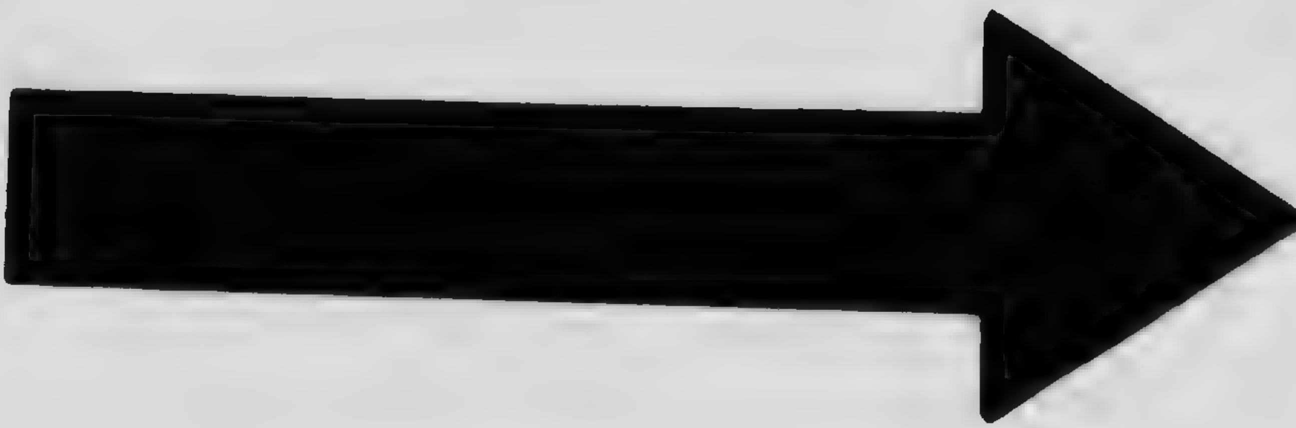
Defect of Title.—This phrase was introduced into the Imperial Act as a substitute for the old expression "equity attaching to the bill," as the latter term was unknown in Scotch law. The corresponding provision in the Quebec Civil Code is found in Art. 2287: "The transfer of a bill by indorsement may be made either before or after it becomes due. In the former case the holder acquires a perfect title free from all liabilities and objections which any parties may have had against it in the hands of the indorser; in the latter case the bill is subject to such liabilities and objections in the same manner as if it were in the hands of the previous holder." The chief "defects of title" are fraud, duress, force or fear, or other unlawful means in obtaining the bill or the acceptance thereof, illegal consideration, or negotiation in breach of faith: section 29, s-s. 2; or being given for a patent right: section 30, s-s. 4; or set-off or compensation.

Where a bill has been discharged by payment or otherwise and is improperly negotiated after maturity, this is not, strictly speaking, a defect in title, as the bill is no longer a bill.

ILLUSTRATIONS.

1. Where plaintiff took a note after maturity from a holder who had agreed that it should be set off against a bond, he took it subject to this defence: Broke v. Arnold, Taylor U. C. 25 (1823).

2. The admissions of the holder of an overdue note are admissible, without calling him, against plaintiff, to whom he subsequently transferred it: Myers v. Cornell, 2 U. C. Q. B. 270 (1845).



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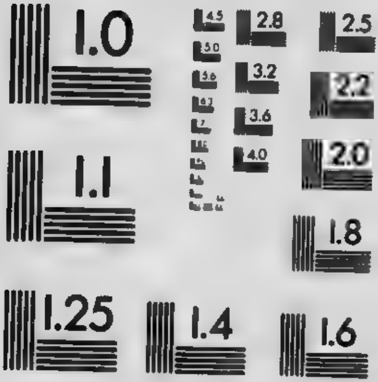

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Overdue bill.

3. Where an overdue note is transferred, and there has been a partial failure of consideration, such failure is a good defence pro tanto: Rennie v. Jarvis, 6 U. C. Q. B. 329 (1850).

4. Where a note was given to a person to get discounted for the maker, and he discounted it after maturity for his own benefit, it is a good defence: Kerr v. Straat, 8 U. C. Q. B. 82 (1851).

5. The indorsee of a bill or note is liable to such equities only as attach to the bill or note itself and to nothing collateral due from the indorser to the maker, or indorsee to payee: Wood v. Ross, 8 U. C. C. P. 299 (1858); Metropolitan Bank v. Snure, 10 U. C. C. P. 24 (1860); Hughes v. Snure, 22 U. C. Q. B. 597 (1863); Canadian Securities Co. v. Prentice, 9 Ont. P. R. 324 (1882); Ferguson v. Stewart, 2 U. C. L. J. 116 (1856).

6 Where an agent of the holder disposes of an overdue note, without authority, though for value, the purchaser obtains no title against the principal: West v. MacInnes, 23 U. C. Q. B. 357 (1864); Lloyd v. Howard, 15 Q. B. 995 (1850).

7. A valid agreement to give time is an equity which attaches to a bill as against a person taking it after maturity: Britton v. Fisher, 26 U. C. Q. B. 338 (1867).

8. An agreement not to negotiate a note after maturity is an equity attaching to such note when overdue: Grant v. Winstanley, 21 U. C. C. P. 257 (1871); Parr v. Jewell, 16 C. B. 684 (1855).

9. The holder of an overdue note agreed to let a board bill go in reduction. Held, that a subsequent transfer is subject to this claim: Ching v. Jeffery, 12 Ont. A. R. 432 (1885).

10. Where the plaintiff received the note sued on after maturity without consideration and was merely an agent, the maker has a right to set up all matters he could have pleaded against the real owner, and also to obtain a reduction of the usurious interest included in the note and of payments made on account thereof: Brooks v. Clegg, 12 L. C. R. 461 (1862).

11. Where the payee of a note after its maturity indorsed it in part payment of goods to a third party, the latter took it subject to all the equities that had arisen meantime between the maker and payee: Duguay v. Senecal, 1 L. C. L. J. 26 (1865).

12. A person receiving by indorsement a note after it was due, held it under Art. 2287 C. C., subject to the objections to which it was liable in the hands of the indorser. This article differs from the law of England, which makes the indorser liable only to the equities attaching to the note itself, that is, to the equities arising out of the transaction in the course of which the note was made, but not to those

arising out of a collateral matter: Amazon Ins. Co., v. Quebec and Gulf Ports S. S. Co., 2 Q. L. R. 310 (1876). As to law of England see Whitehead v. Walker, 10 M. & W. 696 (1842); Oulds v. Harrison, 10 Ex. 572 (1854).

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Overdue bill

13. Neither this section nor Art. 1487 of the Civil Code prevents the purchaser in good faith of negotiable instruments after their maturity from acquiring a good title from an agent, who disposes of them in fraud of his principal: Macnider v. Young, Q. R. 3 Q. B. 539 (1894). Affirmed in the Supreme Court, where it was also held that a person taking such instruments after maturity, took them subject not only to the equities of prior parties to them, but also to the equities of third parties: Young v. Macnider, 25 S. C. Can. 272 (1895). See Re European Bank, L. R. 5 Ch. 358 (1870).

14. Where a person indorsed a note at the request of the payee on the understanding that he was not to be held liable, he is not liable to a party to whom the payee afterwards indorsed it after it was due: McQuin v. Sorell, 7 N. B. (2 Allen) 140 (1851).

15. A. made a note payable to his own order, and indorsed and delivered it to his son-in-law B. as a gift by way of advancement to B.'s wife. B. transferred it for value after maturity. Held, that the holder could not recover from A.'s executors as the note was void for want of consideration, and he took it subject to that defect: Thomas v. McLeod, 12 N. B. (1 Han.) 388 (1869).

16. An agreement between the maker and payee of a promissory note that it shall only be used for a particular purpose, constitutes an equity which attaches to it in the hands of a bona fide holder for value who takes it after dishonor: MacArthur v. MacDowall, 23 S. C. Can. 571 (1893).

17. A note is made payable for an illegal consideration. After maturity the payee indorses it. The indorsee cannot recover from the maker: Amory v. Merryweather, 2 B. & C. 573 (1824).

18. The indorsee of an overdue note is liable, in an action against the maker, to all equities arising out of the note transaction itself, but not to a set-off in respect of a debt due from the indorser to the maker of the note, arising out of collateral matters: Burrough v. Moss, 10 B. & C. 558 (1830).

19. Part payment is an equity which attaches to a bill: Graves v. Key, 3 B. & Ad. at p. 319 (1832).

20. The fact of a bill being an accommodation bill, is not an equity attaching to it in the hands of a holder to whom the drawer, who is also payee, has indorsed it after maturity: Stein v. Yglesias, 1 C. M. & R. 565 (1834).

§ 36.

21. The fact that a bill is an accommodation bill does not prevent its being negotiated after maturity. A plea to that effect by the acceptor in an action by the indorsee, held bad: Sturtevant v. Ford, 4 M. & G. 101 (1842); Ex parte Swan, L. R. 6 Eq. 344 (1868).

22. A plea that a previous action was begun by another person and is pending, is no defence to an action on a note brought by a holder who acquired it after maturity: Deuters v. Townsend, 5 B. & S. 613 (1864).

23. The acceptors of a bill gave it to the drawer to get it discounted for them. He did not do so, but after its maturity gave it to his solicitors, who were aware of the facts. They claimed to recover as lienholders from the acceptors the amount of their claim against the drawer. Held, that they could not recover: Redfern v. Rosenthal, 86 L. T. 855 (1902).

When bill deemed overdue.

3. A bill payable on demand is deemed to be overdue, within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time; what is an unreasonable length of time for this purpose is a question of fact: Imp. Act, s. 36 (3).

As to this sub-section, Chalmers says, p. 121. "There appears to be no English or American case as to a bill, but the enactment is probably declaratory." It will be observed that the rule here laid down is only for the purposes of this section, and not the purpose of the Statute of Limitations, prescription, interest or the like. The rule here laid down was adopted in England before the Act of 1882 with regard to cheques, which are bills of exchange drawn on a bank, payable on demand: Down v. Halling, 4 B. & C. 330 (1825); Rothschild v. Corney, 9 B. & C. 388 (1829); Serrell v. Derbyshire Ry. Co., 9 C. B. 811 (1850); London & County Banking Co. v. Groome, 8 Q. B. D. 288 (1881).

To determine what is a reasonable time the Judge or jury should take into consideration all the facts of the case: section 40, s-s. 3.

This sub-section does not apply to promissory notes payable on demand which have been negotiated: section 85, s-s. 3. § 36.

4. Except where an indorsement bears date after the maturity of the bill, every negotiation is prima facie deemed to have been effected before the bill was overdue: Imp. Act, s. 36 (4). Presumption as to negotiation.

If the indorsement bears a date, it is presumed to be the true date of indorsing. If undated, it is presumed to have been indorsed before maturity and either on the date of the bill or within a reasonable time thereafter. In any of such cases the contrary may be proved: see Lewis v. Parker, 4 A. & E. 838 (1826); Parkin v. Moon, 7 C. & P. 408 (1836); Bounsall v. Harrison, 1 M. & W. 611 (1836); Good v. Martin, 95 U. S. (5 Otto) 94 (1877).

5. Where a bill which is not overdue has been dishonored, any person who takes it with notice of the dishonor, takes it subject to any defect of title attaching thereto at the time of dishonor; but nothing in this sub-section shall affect the rights of a holder in due course. Imp. Act, s. 36 (5). Taking bill su[illegible] [illegible] to [illegible]nor

This may happen in case of non-payment of a bill payable on demand, or of non-acceptance of another bill, when the bill has not been noted or protested. If taken with notice it is open to the same objections as an overdue bill. In England before the Act there were conflicting decisions. The rule laid down in Crossley v. Ham, 13 East, 498 (1811), and O'Keefe v. Dunn, 6 Taunt. 305 (1815), has been adopted, and that in Goodman v. Harvey, 6 Nev. & Man. 372 (1836), rejected. As to notice, and holders in due course, see sections 29 and 38.

§ 37.

Negotiation of bill to party already liable thereon.

37. Where a bill is negotiated back to the drawer, or to a prior indorser, or to the acceptor, such party may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce the payment of the bill against any intervening party to whom he was previously liable. Imp. Act, s. 37.

A bill is negotiable until it is restrictively indorsed or discharged by payment or otherwise: section 36, s-s. 1. As to restrictive indorsements, see section 35; and as to discharge, sections 59-63.

ILLUSTRATIONS.

1. Where a note overdue has been retired and settled by a renewal note, it cannot be put in circulation again, even by the payee, who has taken up the renewal note out of his own funds, at least so as to make a subsequent indorser liable: Cuvillier v. Fraser, 5 U. C. Q. B. 152 (1848).

2. The drawer of a bill payable to his order specially indorsed it. It subsequently came into his hands after maturity. He struck out all the special indorsements, and indorsed it to plaintiff, who sued the acceptor. Held, that he was entitled to recover: Black v. Strickland, 3 O. R. 217 (1883).

3. A bill was paid after maturity by the drawer, who waived protest and indorsed it. Held, that he was liable to the indorsee jointly and severally with the acceptor: Hovey v. Nolin, 18 R. L. 439 (1889).

4. As to a bill negotiated back to the drawer, see Bishop v. Hayward, 4 T. R. 470 (1791); Wilders v. Stevens, 15 M. & W. 208 (1846); Woodward v. Pell, L. R. 4 Q. B. 55 (1868); to a prior indorser, Foster v. Farewell, 13 U. C. Q. B. 449 (1855); Moffat v. Rees, 15 U. C. Q. B. 527 (1858); Gunn v Macpherson, 18 U. C. Q. B. 244 (1859); Morris v. Walker, 15 Q. B. 594 (1850); Wilkinson v. Unwin, 7 Q. B. D. 636 (1881); to the acceptor before maturity, Attenborough v. Mackenzie, 25 L. J. Ex. 244 (1856).

5. One of two joint makers of a note to whom it is negotiated back, cannot re-issue and further negotiate it, so as to make the other joint maker liable: Hopkins v. Farewell, 32 N. H. 429 (1855); Patch v. King, 29 Me. 448 (1849).

38. The rights and powers of the holder of a bill are as follows:— § 38. Rights of the holder.

(*a*) He may sue on the bill in his own name: Imp. Act, s. 38 (1).

The "holder" of a bill has been defined in section 2 as the payee or indorsee who is in possession of it, or the bearer thereof; and "bearer" as the person in possession of a bill or note which is payable to bearer. As there pointed out, the holder need not be the owner; it is sufficient for him to be in possession and entitled at law to recover or receive its contents from another.

If a note is non-negotiable in its origin, the payee alone can be the holder; if negotiable in its origin any person to whom it is negotiated, until it is restrictively indorsed or discharged, is the holder.

If a holder sues on a note, and he is not the owner but is merely acting for another, any defence that could be set up against the real owner is available against him: Biron v. Brossard, M. L. R. 2 S. C. 105 (1880); Lee v. Zagury, 8 Taunt. 114 (1817); Re Anglo-Greek Navigation Co., L. R. 4 Ch. 174 (1869); Thornton v. Maynard, L. R. 10 C. P. 695 (1875).

Plaintiff must be the holder of the bill when the action is instituted: Emmett v. Tottenham, 8 Exch. 884 (1853). An action was brought for the price of goods for which the buyer had given a bill, which was in the hands of a third party and dishonored. The action was dismissed although plaintiff got possession of the bill before the trial: Davis v. Reilly, [1898] 1 Q. B. 1.

This section furnishes one of the tests of whether or not an instrument is negotiable. If it may pass by delivery or indorsement as provided in section 31, and if the holder who so acquires it can sue upon it in his own name, then it is in the proper sense of the term a negotiable instrument, and has the special privileges accorded to such instruments by the law merchant.

§ 38.

Rights of the holder.

The right to sue upon a bill accrues upon its dishonor for non-acceptance: section 43, s-s. 2; or for non-payment: section 47, s-s. 2.

As to an action on a lost bill or note, see section 69.

In the case of the death of the holder of a bill, his executor or personal representative would have the same right to sue as he himself would have had. So also would the assignee or trustee of a bankrupt holder.

ILLUSTRATIONS.

1. Defendant gave to plaintiff's wife his note in payment of a legacy. She died before the note was paid. Her husband sued the maker. A defence that the note was in the wife's possession up to her death and that there was no administration to her estate was upheld: Robinson v. Cripps, 6 U. C. C. P. 381 (1856).

2. Plaintiffs declared against the acceptor of a bill as drawn in their favor. It was on its face payable "to the order of T. G. Ridout, cashier," and indorsed "Pay J. Smart, cashier, or order, T. G. Ridout," but the signature T. G. Ridout had been erased. At the trial an amendment was allowed alleging that the bill was payable to the order of Ridout, who indorsed to Smart, and that Ridout and Smart, being plaintiff's cashiers and agents, received the bill for them and as their property. Held, that the beneficial interest plaintiffs were alleged to have in the bill did not entitle them to sue on it in their own name: Bank of U. C. v. Ruttan, 22 U. C. Q. B. 451 (1863).

3. The holder of notes as collateral security against future liability can sue upon them when they mature and before the liability arises. Plaintiff, who held the notes indorsed in blank, as his father's agent, could sue upon them in his own name: Ross v. Tyson, 19 U. C. C. P. 294 (1869).

4. A note indorsed in blank may be sued in the name of a person to whom the owner has handed it for that purpose, even although the plaintiff has no beneficial interest in the note: Shepley v. Hurd, 3 Ont. A. R. 549 (1879); Mills v. Philbin, 3 Rev. de Leg. 255 (1848); Ridgeway v. Dansereau, Q. R. 17 S. C. 176 (1899).

5. An action on a promissory note not produced will be dismissed: Hudon v. Girouard, 21 L. C. J. 15 (1875).

6. The holder of a promissory note, although without personal interest in it, may sue on it in his own name, the defendant being sufficiently protected by being allowed to set up any defence he may have against the real owner: McKinnon v. Kerouack, 15 R. L. 34

(1877); Biron v. Brossard, M. L. R. 2 S. C. 105 (1880); Leet v. Ingram, ibid. (1885); Fulton v. Lafleur, Q. R. 5 S. C. 431 (1894); Allison v. Central Bank, 9 N. B. (4 Allen) 270 (1859); Howard v. Godard, ibid. 452 (1860); Street v. Quinton, 18 N. B. 567 (1879). § 38. Right to sue.

7. The maker of a note when sued by the indorsee has no right to plead that the note belongs to the insolvent estate of the payee and not to plaintiff: Lemay v. Boissinot, 10 Q. L. R. 90 (1883).

8. Where an indorser paid a note which was detained by the government, and there was no delivery, actual or legal, to the company plaintiff, the latter could not recover as holder: Compagnie de Moulins v. Parkin, Q. R. 4 S. C. 365 (1893).

9. Compensation does not take place between a debt which is clear and liquidated and a promissory note of which the person offering it is the holder for collection only: Laforest v. Inkiel, Q. R. 11 S. C. 534 (1897).

10. A promissory note made payable to John Souther & Son, was sued by John Souther & Co. It being clear from the evidence that the plaintiffs were the persons designated as payees, it was held that they could recover: Wallace v. Souther, 16 S. C. Can. 717 (1889), affirming 20 N. S. 509 (1888).

11. A note in favor of a life insurance agent with the addition of his agency, given for a premium on a policy, may be sued by him or transferred by indorsement: McDonald v. Smaill, 25 N. S. 440 (1893).

12. Where a bill is made payable to bearer, or is indorsed in blank, the person who has actual or constructive possession of it may sue upon it, and the person liable on the bill cannot question his right: Clerk v. Pigot, 12 Mod. 193 (1699); Ord v. Portal, 3 Camp. 239 (1812); Low v. Copestake, 3 C. & P. 300 (1828); Wood v. Connop, 5 Q. B. 292 (1843); Emmett v. Tottenham, 8 Ex. 884 (1853); Demuth v. Cutler, 50 Me. 300 (1862).

13. But possession by a nominal holder does not give him the right to sue if he holds the bill adversely to the real owner: Jones v. Broadhurst, 9 C. B. 173 (1850); Logan v. Cassell, 88 Penn. St. 290 (1879); Towne v. Wason, 128 Mass. 517 (1880).

14. The holder may sue on a bill without ever having had any interest therein: Law v. Parnell, 7 C. B. N. S. 282 (1859); Jenkins v. Tongue, 29 L. J. Ex. 147 (1860); or after he has parted with his interest: Williams v. James, 15 Q. B. 498 (1850); Poirier v. Morris, 2 E. & B. 89 (1853).

15. The holder of a bill, without the knowledge or authority of the plaintiff, indorsed and delivered it to an attorney for the plaintiff, in order that an action might be brought upon it in his name, and the

§ 38. plaintiff after action brought ratified the act. Held, that the subsequent ratification was equivalent to a prior authority, and that the plaintiff had a valid title to sue on the bill: Ancona v. Marks, 7 H. & N. 686 (1862).

Rights of holder in due course.

(*b*) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill; Imp. Act, s. 38 (2).

A "holder in due course," is one who takes a bill, complete and regular on its face, before maturity, in good faith, without notice of any defect in the bill or in the title of the person negotiating it to him. The principal defects of title arise from fraud, duress or other unlawful means, illegal consideration or fraudulent negotiation: section 29. "Mere personal defences" might include the foregoing, and also set-off, compensation, etc. They would not include want of capacity, want of authority, the defence of forgery or the like.

Anything which renders a note absolutely void would not be included in either of the above terms.

ILLUSTRATIONS.

See illustrations under section 29, s-s. 2, and 30, s-s. 2.

Right to sue.

1. A note indorsed on condition that it was to be used to renew another note was fraudulently negotiated by the maker for value before maturity. Held, that the holder, being in good faith could recover from the indorser: Larkin v. Willard, 5 U. C. O. S. 661 (1828); Cross v. Currie, 5 Ont. A. R. 31 (1880).

2. A note given for lottery tickets is not void under 12 Geo. 2, c. 28, in the hands of a bona fide holder for value before maturity: Evans v. Morley, 21 U. C. Q. B. 547 (1862).

3. Where the maker signed a blank note and delivered it to the payee to fill up, and the latter fraudulently filled it up for a larger sum than authorized, the plaintiff, an indorsee before maturity for value without notice, can recover the full amount from the maker: McInnes v. Milton, 30 U. C. Q. B. 489 (1870); Merchants' Bank v. Good, 6 Man. 339 (1890).

4. A cheque given in settlement of losses at matching coppers is a note of hand given in consideration of a gambling debt, within R. S. O. c. 47, s. 53, s-s. 3, and such a security is void under 9 Anne, c. 14, even in the hands of a bona fide holder for value: Summerfeldt v. Worts, 12 O. R. 48 (1886). § 38. Right to sue.

5. A note given for a gambling debt is null and void even in the hands of an innocent indorsee for value before maturity: Biroleau v. Derouin, 7 L. C. J. 128 (1863). Contra, Dion v. Lachance, Q. R. 14 S. C. 77 (1898).

6. A note given in violation of paragraph 3 of the Insolvent Act of 1864 is an absolute nullity, and is void ab initio even in the hands of a third party, innocent holder for value before maturity: Davis v. Muir, 13 L. C. J. 184 (1869).

7. Cheques fraudulently initialled by the manager of a bank and for which the drawer has given in exchange to the manager certain securities which the bank retains, cannot be repudiated by the bank when the cheques are held by a bona fide holder for value: Banque Nationale v. City Bank, 17 L. C. J. 197 (1873).

8. A note given for an illegal consideration, namely, to induce a witness not to give evidence on a criminal prosecution, may be collected by a bona fide holder for value before maturity: Dorais v. Chalifoux, 6 R. L. 323 (1875).

9. The holder of a promissory note for value without notice can recover against the indorser, although the agent to whom the latter transmitted the note delivered it against his instructions: Sylvain v. Flanagan, Ramsay A. C. 80 (1875). See as to maker, Hastings v. O'Mahoney, 9 N. B. (4 Allen) 305 (1859).

10. A note fraudulently made by a partner in the partnership name, binds the firm in the hands of a bona fide holder for value: Walter v. Molsons Bank, Ramsay A. C. 80 (1877).

11. Where a note was given by an insolvent to a creditor for his consent to his discharge, an indorsee who received it before maturity for value, and without notice, can recover from the maker: Girouard v. Guindon, 2 L. N. 270 (1879).

12. A party to a bill or note when sued by the holder has no right to have the action stayed by dilatory exception, until other parties who may be liable to him are called in as warrantors: Durocher v. Lapalme, M. L. R. 1 S. C. 494 (1885); Block v. Lawrance, M. L. R. 2 S. C. 279 (1886); Molsons Bank v. Charlebois, Q. R. 2 S. C. 286 (1892); Merchants' Bank v. Moseley, 24 N. S. 301 (1892). Beaulieu v. Demers, 5 R. L. 244 (1874); and Mathieu v. Mousseau, 5 R. L. 260 (1874), contra, overruled.

§ 38.

Right to sue.

13. Where an illiterate man was led to believe that he was becoming a party to an agreement, but the instrument proved to be a promissory note, and he was not guilty of negligence, he is not liable on the note even to a holder in due course: Banque Jacques Cartier v. Lescard, 13 Q. L. R. 39 (1886); L'Abbe v. Normandin, 32 L. C. J. 163 (1888); Banque Jacques Cartier v. Lalonde, Q. R. 20 S. C. 43 (1901); Foster v. Mackinnon, L. R. 4 C. P. 704 (1869); Lewis v. Clay, 14 T. L. R. 149; 67 L. J. Q. B. 224 (1897); Puffer v. Smith, 57 Ill. 527 (1871); Griffiths v. Kellogg, 39 Wis. 290 (1876).

14. A person who receives for value in good faith a cheque on the day of its date which is payable four days later, can enforce it against the drawer, even if improperly obtained by the first holder: Kenny v. Price, 20 R. L. 1 (1890).

15. A promissory note made by a married woman, separate as to property, in favor of a creditor of her husband is absolutely null, and no action can be maintained thereon by a bank which has discounted the same in good faith before maturity, in ignorance of the cause of nullity: Banque Nationale v. Guy, M. L. R. 7 S. C. 144 (1891): Ricard v. La Banque Nationale, Q. R. 3 Q. B. 161 (1893); Maclean v. O'Brien, Q. R. 12 S. C. 110 (1896).

16. Abuse of power or betrayal of trust by an agent who indorses a bill of exchange for his principal, does not affect the recourse against the latter of a bona fide holder for value, who had no knowledge of such abuse or betrayal: Quebec Bank v. Bryant, 17 Q. L. R. 98 (1891).

17. Where the maker was aware he was signing a promissory note, fraud on the part of the person to whom he delivered it will not prevent a holder in due course recovering on it: Banque Jacques Cartier v. Leblanc, Q. R. 1 Q. B. 128 (1892).

18. A note given to a creditor to induce him to sign a deed of composition is void as between the parties: but is valid in the hands of a holder in due course, or of one who holds it for him: Bellemare v. Gray, Q. R. 16 S. C. 581 (1899).

19. Pleas set aside where a demand note sued on was for a gambling debt, but the plaintiff, an indorsee for value, was not aware of the nature of the consideration: Laurence v. Hearn, 21 N. S. 575 (1888).

20. In an action by a bona fide indorsee of a note for value before maturity against the indorsers, it is no defence that the note was indorsed in the firm name by one of the partners fraudulently without the knowledge of the others, and for matters not relating to the business of the partnership: McLeod v. Carman, 12 N. B. (1 Han.) 592 (1869).

§ 38.

21. A writ of attachment having issued against the payee of a promissory note, he indorsed and delivered the note, and the holder indorsed it before maturity for value to plaintiff, who was not aware of the insolvency of the payee. Held, that he was entitled to recover: Maclellan v. Davidson, 20 N. B. (4 P. & B.) 338 (1880).

Rights, etc.

22. A bill was indorsed for value before maturity by the drawer who was the payee. On its dishonor the holder returned it to the drawer, by whom it was sent back to the indorsee, who sued upon it. The acceptor set up as a defence that he had not received value from the drawer. Held, that this was no defence: that the mere sending of the bill back to the drawer did not deprive the plaintiff of his rights as a holder in due course: Cohn v. Werner, 8 T. L. R. (1891).

Holder with defective title.

(*c*) Where his title is defective, (1) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (2) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill: Imp. Act, s. 38 (3).

See the preceding sub-section as to a defective title and as to the rights of a holder in due course.

Payment in due course means payment made at or after the maturity of the bill to the holder thereof in good faith, and without notice that his title to the bill is defective: section 59. If a bill be made payable to bearer or indorsed in blank, the person in possession may be presumed to be entitled to receive payment in due course, and payment to him is valid if made in good faith, although he may be a thief, finder, or fraudulent holder: Byles, p. 296; Randolph, § 1444.

In order to vitiate the payment by the maker of a promissory note indorsed in blank, bad faith must be shown; payment under circumstances of suspicion is not enough. The maker is only bound to assure himself of the genuineness of the signatures, and is not bound to make any enquiry: Ferrie v. Wardens of the House of Industry, 1 Rev. de Leg. 27 (1845); Johnson v. Way, 27 Ohio St. 374 (1875).

§ 39.

General Duties of the Holder.

Sections 39 to 52, inclusive, define the general duties of the holder with reference to obtaining payment of the bill. They include its presentment for acceptance where this is necessary, presentment for payment, notice of dishonour to those who are only conditionally liable, and who may be released if notice is not given them, and protest made in certain cases. In a number of respects the rules as to presentment, protest and notice differ from those in the Imperial Act. These will be pointed out in the notes under the respective sections.

When presentment for acceptance is necessary.

39. Where a bill is payable at sight or after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument; Imp. Act, s. 39 (1); C. C. 2290.

This sub-section in the Imperial Act reads, "Where a bill is payable after sight," etc. The words "at sight or" were inserted in the bill in the Canadian House of Commons after it had been determined not to change our law which allowed grace on bills payable at sight, and they had been struck out of section 10, where they stood as one of the classes of bills payable on demand. In England a sight bill is payable on demand, so that it need not be presented for acceptance.

Bills payable at or after sight.

The acceptance of a bill payable at or after sight should be dated, so that it may be known from what day the time runs. A sight bill is payable on the third day after acceptance, one payable after sight on the third day after the expiration of the time mentioned in the bill. See section 14, s-ss. 3 and 4, and section 40. The sub-section as it stands is in accordance with the law of England before the passage of the Act of 1871; Campbell v. French, 6 T. R. at p. 212 (1795); Holmes v. Kerrison, 2 Taunt. 323 (1810); Sturdy v. Henderson, 4 B. & Ald. 592 (1821).

§ 39. Presentment to drawee.

A bill should be presented for acceptance to the drawee, personally, or at his place of business or residence; or to his authorized agent. If it is addressed to him at a particular place, it may be treated as dishonored if he has absconded: Anon. 1 Ld. Raym. 743 (1701); but if he has merely changed his residence or place of business, or if the bill is not addressed to him at a particular place, it is incumbent on the holder to use due diligence to find him. And due diligence in such a case is a question of fact: Collins v. Butler, 2 Stra. 1087 (1729); Bateman v. Joseph, 12 East, 433 (1810). It is not enough to present it to some person in the drawee's yard, without knowing who that person is: Cheek v. Roper, 5 Esp. 175 (1805).

Place of presentment.

The Act does not give definite directions as to the proper place to present a bill, but the rules laid down in section 45, s-s. 2 (a), as to presentment for payment, would seem to be reasonable in so far as they are applicable. According to this, a bill should be presented for acceptance, (1) at the address given, if any; (2) if no address is given, to the drawer personally or to his duly authorized agent, or at his ordinary place of business, if known; and if not, at his ordinary residence, if known. If he has no known residence in the place it may be presented at his last known place of business or residence, or if he has had none, then at the post office. The latter of course would not be applicable to presentment for acceptance.

Express stipulation as to presentment.

2. Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment: Imp. Act, s. 39 (2).

The second part of this sub-section, according to Chalmers (p. 134), settles a point which had not been decided in England. In Upper Canada it had been decided that presentment for acceptance was not necessary in such a case, so

§ 39. that it introduces new law in Ontario: Richardson v. Daniels, 5 U. C. O. S. 671 (1838). This latter is the rule in the United States: Daniel, § 454; Walker v. Stetson, 19 Ohio St. 400 (1869); but not in France: Nouguier, § 1068.

No presentment in any other case.

3. In no other case is presentment for acceptance necessary in order to render liable any party to the bill: Imp. Act, s. 39 (3).

A bill payable at a fixed period after date, or on or at a fixed period after the occurrence of a specified event, need not be presented for acceptance, unless it come within subsection 2. Although not necessary, it is, however, advisable to present such bills for acceptance, in order to secure the liability of the drawee if he accepts, or to have recourse at once against the other parties liable on the bill if he refuses to accept. An agent should in all cases present such bills for acceptance, or he may be held liable for negligence: Allen v. Suydam, 20 Wend. (N.Y.) 321 (1838); Pothier, Change, No. 128; Nouguier, § 462. If the bill contain the words "acceptance waived" or equivalent words, it need not be presented except for payment: Reg. v. Kinnear, 2 M. & R. 117 (1838); Freeman v. Boynton, 7 Mass. 483 (1811); Nouguier, § 470.

Necessary delay for presentment.

4. Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers. Imp. Act, s. 30 (4).

This sub-section is introduced in order to prevent hardship from the rule laid down in sub-section 2. It is applicable to bills payable at a fixed period after date, or on the occurrence of a specified event or at a fixed period after it.

What is "reasonable diligence" will depend upon the facts and circumstances of each particular case. § 40.

40. Subject to the provisions of this Act, when a bill payable at sight or after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time: Imp. Act, s. 40 (1); 54-55 Vict. c. 17, s. 5 (Can.) Time for presenting bill payable after sight.

The words "at sight or" are not in the Imperial Act, as bills payable at sight being payable on demand need not be presented for acceptance. Our Act of 1890 copied the Imperial Act without making the change in this section to correspond with that in section 10, omitting bills payable at sight from among those payable on demand. This was remedied, and these words added, by the amending Act of 1891.

The rule laid down in this sub-section is that in force in England before the change in the law: Byles (6th ed.) p. 139; and is also the law in most of the United States: Daniel, § 454; and was in Quebec: C. C. Art. 2291. As to what is a reasonable time, see sub-section 3.

The reason for the rule is that the drawer, and prior indorsers, if any, have a right to expect that they shall not be prejudiced by undue delay, as they have an interest in knowing at an early date whether the drawee will accept, and also in case he accepts that the date of payment shall not be unduly postponed, thus extending the period of their liability, and increasing the risk of their losing through the failure of the acceptor.

"Subject to the Provisions of this Act."—These provisions are those that relate to excuses for presentment, which are found in section 41, s-s. 2.

2. If he does not do so, the drawer and all indorsers prior to that holder are discharged: If not presented.

§ 40.

As to reasonable time.

3. In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case. Imp. Act, s. 40 (2) (3).

What is a reasonable time to present such a bill for acceptance has been held to be a mixed question of law and fact: Perley v. Howard, 4 N. B. (2 Kerr) 518 (1844); Tindal v. Brown, 1 T. R. 168 (1786); Muilman v. D'Eguino, 2 H. Bl. 565 (1795); Shute v. Robins, 3 C. & P. 80 (1828); Mellish v. Rawdon, 9 Bing. 416 (1832); Mullick v. Radakissen, 9 Moore P. C. 46 (1854); Wallace v. Agry, 4 Mason (U. S.) 336 (1827). But see section 36, s-s. 3, where what is an unreasonable length of time for a demand bill to be in circulation is made a question of fact alone.

No absolute rule has ever been laid down in England, the United States or Canada, as to what is a reasonable time for such presentment. In France, a limit of three months is fixed for Europe and Algeria, four months for Asia, six months for America and Southern Africa, and a year for the rest of the world: Code de Com. Art. 160, as amended by the law of the 3rd of May, 1862.

ILLUSTRATIONS.

1. A bill drawn in Toronto on August 6th, by a party dealing in bills, on New York, payable at sight, in favor of a party living in Illinois to be sent there as a remittance and for circulation, which passed through a number of hands, was presented in New York on November 10th. The jury found that the delay was not unreasonable, and the court refused a new trial: Boyes v. Joseph, 7 U. C. Q. B. 505 (1850).

2. A bill of exchange was drawn on the 27th of August, and after passing through the hands of two intermediate holders, was presented on the 1st of September, and refused payment, and protested on Sept iber 8th, all parties being in Montreal. The holder sued the last indorser. Held, that presentation and protest had not been made with due diligence, and action dismissed: Harris v. Schwob, 3 R. L. 453 (1871).

§ 41.

Reasonable time

3. Defendants indorsed on October 8th, a bill payable after sight, drawn on Liverpool, England. The drawer held it over two mails, and on November 5th sold it for full value to plaintiffs, who remitted it the same day. It was accepted, but the acceptor failed before it became due. Defendants claimed that they were discharged by want of diligence in presenting. Plea struck out on the ground that there was no such delay as would constitute a defence: Wylde v. Wetmore, 7 N. S. (1 G. & O.) 504 (1869).

4. A jury having found a verdict against the drawee, on a bill drawn in Windsor, payable in London a month after sight, and presented on the fourth day, the Court held that the delay was unreasonable and refused a new trial: Fry v. Hill, 7 Taunt. 397 (1817).

5. A bill drawn on August 12th, in Carbonear, Newfoundland, on London, payable 90 days after sight, was presented for acceptance November 16th. There was a daily mail from Carbonear to St. John's, 20 miles, and a tri-weekly mail from St. John's to London. The delay was not explained. The jury found the delay to be unreasonable and the Court refused a new trial: Straker v. Graham, 4 M. & W. 721 (1839).

6. A bill drawn at Calcutta, February 16th, on Hong Kong at 60 days after sight was indorsed and negotiated by the drawers. On account of the state of the money market the indorsee kept it five months and then negotiated it. The holder presented it on October 24th to the drawee at Hong Kong, who refused to accept it. The Supreme Court at Calcutta found the delay unreasonable, and the Privy Council would not disturb the finding: Mullick v. Radakissen, 9 Moore P. C. 46 (1854).

7. A demand made three months after the date of a note held not to have been made within a reasonable time, no special circumstances being shown, and an old statute naming sixty days: Merritt v. Jackson, 181 Mass. 69 (1902).

Rules as to presentment for acceptance

41. A bill is duly presented for acceptance which is presented in accordance with the following rules:

(*a*) The presentment must be made by or on behalf of the holder to the drawee or to some person authorized to accept or refuse acceptance on his behalf, at a reasonable hour on a business day and before the bill is overdue: Imp. Act, s. 41 (1) (*a*).

§ 41.

By or for holder.

The holder by whom or on whose behalf a bill is presented need not be the owner or even a lawful holder: section 2 (*g*); Morrison v. Buchanan, 6 C. & P. 18 (1833); Nouguier, § 462.

Hour and day.

As to what is a reasonable hour may depend on where the bill should be presented. If at a bank it should be during banking hours; if at another office, during ordinary office hours; if at a private house, it may be earlier in the morning or later in the evening: Parker v. Gordon, 7 East, 385 (1806); Elford v. Teed. 1 M. & S. 28 (1813); Wilkins v. Jadis. 2 B. & Ad. 188 (1831); Cayuga Co. Bank v. Hunt, 2 Hill (N. Y.) 635 (1842). Any day is a business day except those mentioned in section 14: see section 91. A bill should be presented for acceptance before maturity. If accepted after maturity it becomes a bill payable on demand, and should then be presented for payment within a reasonable time so as to bind indorsers after acceptance: section 45, s-s. 2 (*b*).

Mode of presentment.

The Act does not give precise directions as to the presentment of a bill for acceptance. Some of the rules laid down in section 45 as to presentment for payment are no doubt applicable; but there is a difference in principle between the two presentments, the former being personal, and the latter local. Where a drawee has accepted a bill he knows when and where it will be presented for payment, and all that is required is that some person on his behalf shall be there at the time with the money to hand over, and to receive the bill. In the case of a presentment for acceptance, however, even if advised by the drawer of the drawing, he may not know when the holder may choose to present it.

When a bill is payable 15 days after sight a demand of payment unaccompanied by a presentment for acceptance is insufficient, and the action will be dismissed: Cousineau v. Lecours, M. L. R. 4 S. C. 249 (1888). The bill should be actually exhibited to the drawee: Fall River U. Bank v. Willard, 5 Metcalf (Mass.) 216 (1842).

(*b*) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, when presentment may be made to him only; Imp. Act, s. 4 (*b*). § 41. Drawees not partners.

If all the drawees do not accept, the acceptance is a qualified one: section 19, s-s. 2 (*d*); and the holder should either notify the drawer and indorsers, or treat the bill as dishonored by non-acceptance; otherwise the drawer and indorsers will be discharged: section 44.

(*c*) Where the drawee is dead, presentment may be made to his personal representative: Imp. Act, s. 41 (*c*). Drawee dead.

As to the law in England, Chalmers says, p. 139, "Before this enactment the law on this point was very doubtful": Smith v. New South Wales Bank, 8 Moore P. C. N. S. 461, 462 (1872). In Quebec the rule was laid down in Art. 2290 C. C.: "If the drawee be dead or cannot be found and is not represented, presentment is made at his last known domicile or place of business."

It will be observed that presentment to the personal representative is optional with the holder. He may treat the bill as dishonored by non-acceptance without presenting it at all: sub-section 2.

(*d*) Where authorized by agreement or usage, a presentment through the post office is sufficient: Imp. Act, s. 41 (*e*). Through the post.

"This enactment gives effect to the recognized practice among English merchants": Chalmers, p. 140. Long before the Act it had been well established in England with regard to cheques: Bailey v. Bodenham, 16 C. B. N. S. 288 (1864); Prideaux v. Criddle, L. R. 4 Q. B. 461 (1869); Heywood v. Pickering, L. R. 9 Q. B. 432 (1874).

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The same usage was followed in Canada by banks with regard to cheques drawn upon their own correspondents: The Queen v. Bank of Montreal, 1 Exch. Can. 154 (1886).

As to presentment for payment through the post, or at the post office, see section 45, s-ss. 6 and 7.

Excuses for non-presentment.

2. Presentment in accordance with these rules is excused, and a bill may be treated as dishonored by non-acceptance—

(*a*) Where the drawee is dead, or is a fictitious person or a person not having capacity to contract by bill; Imp. Act, s. 41 (2) (*a*); 54-55 Vict. c. 17, s. 6 (Can.)

Drawee dead.

Where the drawee is dead the holder may either treat the bill as dishonored by non-acceptance or may present it to his personal representative: sub-section 1 (*c*).

The Act of 1890 read "Where the drawee is dead or bankrupt," following the Imperial Act. As there is no bankrupt law in Canada the words were struck out in other places, but left in here by inadvertence. They were struck out by the amending Act of 1891. Where there has been an assignment for the benefit of creditors, or an abandonment of his estate, by a debtor under a provincial Act, presentment should still be made to him.

As to a fictitious drawee, see section 5, s-s. 2; and as to capacity to contract by bill, see section 22.

Presentment impossible.

(*b*) Where, after the exercise of reasonable diligence, such presentment cannot be effected; Imp. Act, s. 41 (2) (*b*).

Reasonable diligence is a question to be determined according to the facts and circumstances of each particular case: see section 45, s-s. 2, and section 50, s-s. 2 (*a*).

(c) Where, although the presentment has been irregular, acceptance has been refused on some other ground: Imp. Act, s. 41 (2) (c). § 42. Ground of refusal

This is on the ground of estoppel. A refusal to accept is an acknowledgment of the sufficiency of the presentment

3. The fact that the holder has reason to believe that the bill, on presentment, will be dishonored does not excuse presentment. Imp. Act, s. 41 (3). No excuse

This was the law in England before the Act: Ex parte Tondeur, L. R. 5 Eq. 165 (1867).

A similar rule prevails as to presentment for payment: section 46, s-s. 2 (a).

42. The drawee may accept a bill on the day of its due presentment to him for acceptance, or at any time within two days thereafter. When a bill is so duly presented for acceptance and is not accepted within the time above mentioned, the person presenting it must treat it as dishonored by non-acceptance. If he does not the holder shall lose his right of recourse against the drawer and indorsers. Non-acceptance within two days.

2. In the case of a bill payable at sight or after sight, the acceptor may date his acceptance thereon as of any of the days above mentioned, but not later than the day of his actual acceptance of the bill; and if the acceptance is not so dated, the holder may refuse to take the acceptance and may treat the bill as dishonored by non-acceptance. 2 Edw. VII. c. 2, s. 1. Dating of acceptance.

§ 42.

History of clause.

History of Clause.—In the Imperial Act a bill is to be treated as dishonored if it is not accepted "within the customary time." In the Canadian draft bill the same expression was used. It was changed in the Commons so as to require acceptance on the day of presentment or on the next business day, which was in accordance with Canadian usage, at least in the principal cities of Ontario and Quebec. In the Senate the time was extended to two days. This would mean two business days: section 91. The law remained in this form until the 15th May, 1902, when it was amended in the above form.

The change was made on account of the apparent clashing between this section which expressly allowed two days to accept and section 18, s-s. 2, which says that the holder is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance. The point was whether an acceptance as allowed by section 42 was a qualified acceptance which the holder could refuse to take, and which would discharge the drawer and indorsers who did not assent thereto. The general opinion appears to have been that the legal effect of these sections as they formerly stood was to authorize the practice laid down in this section as it now stands, and such appears to have been the general commercial usage throughout Canada. On account however of dissent being expressed by some, the amendment of 1902 was passed to put it beyond question.

In cases of urgency, say for instance, where a demand draft is attached to a bill of lading of perishable goods, a more speedy acceptance is required, special instructions should be given, as otherwise the drawee would be justified in claiming and the party presenting the bill in granting the delay mentioned in the Act. In case of a draft on a known business house the usual practice is to leave the bill for acceptance. If it is detained by the drawee protest may be made on a copy or written particulars of the bill: section 51, s-s. 8.

Before the law required an acceptance to be in writing on the bill, detention beyond the time prescribed by law was

treated as an acceptance: Harvey v. Martin, 1 Camp. 425, n. (1807). Such is still the law in most places where parol acceptances are recognized. § 43.

43 A bill is dishonored by non-acceptance— Dishonor by non-acceptance

(*a*) When it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained; or—

(*b*) When presentment for acceptance is excused and the bill is not accepted: Imp. Act, s. 43 (*a*) (*b*).

The rules for the due presentment of a bill for acceptance have been given in section 41, s-s. 1. The requisites of a valid acceptance are set forth in sections 17 and 19. If a qualified acceptance is offered, see section 44 as to the rights and duties of the holder or the bill. The holder may wait two days after presentment for an acceptance; if not then obtained he must treat the bill as dishonored: section 42. The circumstances which excuse presentment are given in section 41, s-s. 2.

2. Subject to the provisions of this Act, when a bill is dishonored by non-acceptance an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary. Imp. Act, 3, 43 (2). Recourse in such case.

The provisions of the Act to which this sub-section is subject, and which suspend the immediate right of recourse against the parties named, are those relating to acceptance and payment for honor, sections 64 to 67. If the drawer or indorser has named a referee in case of need, the holder has the option of proceeding immediately against the drawer and indorsers after the dishonor of the bill by the drawee, or of resorting to the referee: section 15. If he applies to the referee and he accepts, the holder must await the maturity

§ 44. of the bill to see whether it will be paid. If after dishonor, the drawee is willing to accept, the holder may allow him to do so; but such acceptance, if the bill is payable at or after sight, should bear the date of the first presentment: section 18.

Old law.

In England the rule laid down in this sub-section has long been recognized as law. See as to the drawer, Milford v. Mainwaring, 1 Douglas, 54 (1779); and as to the indorser, Ballingalls v. Gloster, 3 East, 481 (1803). So also in Upper Canada. In Ross v. Dixie, 7 U. C. Q. B. 414 (1850), Robinson, C.J., said: "An indorser, like the drawer, is liable the moment the holder is refused acceptance." It has been held in England, that the right of action is not complete until notice of dishonor has had time to reach the parties. Whitehead v. Walker, 9 M. & W. 506 (1842); Castrique v. Bernabo, 6 Q. B. 498 (1844). In Quebec it was sufficient that the notice was sent: C. C. Art. 2298. So also in the United States: Lenox v. Cook, 8 Mass. 460 (1812); Robinson v. Ames, 20 Johns. 146 (1822); Shed v. Brett, 1 Pick. 401 (1823); Boston Bank v. Hodges, 9 Pick. 420 (1830); Watson v. Tarpley, 18 Howard (U. S.) at p. 519 (1855).

French law.

Under the modern French law no right of action accrues on dishonor for non-acceptance. The holder can only protest the bill and claim security from the drawer and indorsers until the maturity of the bill: Code de Com. Art. 120. Under old French law he had also to await maturity and protest for non-payment: Pothier, Change, No. 133; Preston v. Johnston, 2 Rev. de Leg. 28 (1813).

As to qualified acceptances.

44 The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonored by non-acceptance: Imp. Act, s. 44 (1).

A qualified acceptance is one which in express terms varies the effect of the bill as drawn: section 19. The examples there enumerated are acceptances that are conditional, partial, qualified as to time or by some of the drawees

only. The "unqualified" acceptance of this section is called a general acceptance in section 19. If the drawee insists upon adding anything to a bare acceptance beyond indicating a bank or other place where he will pay, that will vary the terms of the bill, the holder may refuse to take it, and treat the bill as dishonored. This has always been the law in England: Petit v. Benson, Comberbach, 452 (1697); Smith v. Abbott, 2 Stra. 1152 (1741); Parker v. Gordon, 7 East. 387 (1806). Also in the Province of Quebec: "The acceptance must be absolute and unconditional, but if the holder consent to a conditional or qualified acceptance the acceptor is bound by it": C. C. Art. 2293. See also Pothier, Change, Nos. 47-49. The same doctrine is recognized in the United States: Daniel, § 465; Randolph, § 621. If the holder takes a qualified acceptance he is bound by it, and does so at the risk of releasing the drawer and indorsers, save as provided in the two following sub-sections. § 44.

2. Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill; If taken without authority.

The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given; where a foreign bill has been accepted as to part, it must be protested as to the balance: Imp. Act, s. 44 (2). Partial acceptance.

This sub-section is said by Chalmers to introduce new law in England. He probably refers to the exception regarding a partial acceptance, as the first clause appears to have been well recognized in England before the Act of 1882: Byles (7th Ed.), p. 164; Chitty (11th Ed.), p. 207; Sebag v. Abitbol, 4 M. & S. at p. 466 (1816); Rowe v. Young, 2

§ 45. B. & B. 165 (1820). A similar rule prevails in the United States: Daniel, §§ 508, 515; McEowen v. Scott, 49 Vt. 376 (1877). If the holder is willing to accept the offer, he should then give notice of its exact terms to all the parties, and state his readiness to accept the offer, if they will respectively consent: Daniel, § 510.

What is deemed assent.

3. When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he shall be deemed to have assented thereto. Imp. Act, s. 44 (3).

As to what is a "reasonable time" see section 45, s-s. 2 (*b*).

Present-ment for payment.

45. Subject to the provisions of this Act, a bill must be duly presented for payment; if it is not so presented, the drawer and indorsers shall be discharged: Imp. Act, s. 45; C. C. 2322.

The provisions of the Act which relieve from presentment of a bill for payment are the following:—Section 39, s-s. 4, which allows a delay in certain cases for bills that must first be presented for acceptance: section 43, s-s. 2, which provides that a bill dishonored by non-acceptance need not be presented for payment; and section 46, which mentions the circumstances which excuse delay in presenting for payment, or dispense with it entirely.

In presenting a bill it should be exhibited: section 52, ss. 4. See cases under that sub-section, as to a bill being at the place of payment on the day it matures. For the rules as to the presentment of a cheque, see section 73.

The consequence of not duly presenting a bill for payment is that the drawer and indorsers are discharged from their liability, not only on the bill, but also on the consideration for which it was given: Peacock v. Pursell, 14 C. B. N. S. 728 (1863); Hart v. McDougall, 25 N. S. 38 (1892);

section 73. No presentment is necessary as against the acceptor, who is the primary debtor; but if the bill be payable in a specified place and be sued before presentment, the costs are in the discretion of the Court: section 51. See McLellan v. McLellan, 17 U. C. C. P. 109 (1866). § 45.

2. A bill is duly presented for payment which is presented in accordance with the following rules:— Rules as to presentment.

(*a*) Where the bill is not payable on demand, presentment must be made on the day it falls due;

(*b*) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue, in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable;

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case; Imp. Act, s. 45 (1) (2).

Not Payable on Demand.—The rules as to the due date of bills not payable on demand are given in section 14. Presentment must be made on the third day of grace, unless that be a non-business day, when it must be presented on the next business day: Richardson v. Daniels, 5 U. C. O. S. 671 (1838); McLellan v. McLellan, 17 U. C. C. P. 109 (1866).

The former rule in Quebec is thus stated in C. C. Art. 2306: "Every bill of exchange must be presented by the holder, or in his behalf, to the drawee or acceptor for payment, on the afternoon of the third day after the day it becomes due, or after presentment for acceptance if drawn at sight; unless such third day falls upon a legal holiday, in which case the next day thereafter not being a legal holiday is the last day of grace. If the bill be payable at a bank,

§ 45. presentment may be made there either within or after the usual hours of banking." As to the hour at which the presentment should be made, see notes to clause (*c*) of this section. Presentment on the second day of grace is a nullity: Wiffen v. Roberts, 1 Esp. 262 (1795); Mechanics' Bank v. Merchants' Bank, 6 Metc. 13 (1843); Henry v. Jones, 8 Mass. 453 (1812); also on the day after maturity unless the delay is excused: Prideaux v. Collier, 2 Stark. 58 (1817).

Where an indorser gave the holder a memorandum that a note would be good ten days after maturity, he was held liable on a presentment and protest at the end of ten days: Burnett v. Monaghan, 1 R. C. 473 (1871).

Payable on Demand.—As to what bills are payable on demand, see section 10. The modifying provision referred to is that relating to cheques which are bills of exchange payable on demand: section 72. As to a "reasonable time" see section 40. s-s. 3. In France the same delays are fixed for presenting for payment a bill payable on demand as for presenting for acceptance a bill payable after sight: Code de Com. Art. 160 as amended.

As to the delay for presenting for payment promissory notes payable on demand, see section 85.

By whom, where, and to whom.

(*c*) Presentment must be made by the holder or by some person authorized to receive payment on his behalf, at the proper place, as hereinafter defined, either to the person designated by the bill as payer or to his representative or some person authorized to pay or refuse payment on his behalf, if, with the exercise of reasonable diligence, such person can there be found; Imp. Act, s. 45 (3).

Change from Imperial Act.

This clause differs from that in the Imperial Act in two particulars. There the words "at a reasonable hour on a business day" follow the words "on his behalf" in the second line; and the words "or to his representative" in the fifth

§ 45.

line are not found in the Imperial Act. Our Act does not specify the hour of presentment for payment; but section 51, s-s. 6 (*b*), provides that a protest shall not be made until after three o'clock in the afternoon. The Quebec Civil Code provided that a bill should be presented "in the afternoon, and if payable at a bank "either within or after the usual hours of banking": Art. 2306.

Rules vary

The English rule has been stated as follows: If a bill be payable at a bank it must be presented within banking hours: Elford v. Teed, 1 M. & S. 28 (1813); Parker v. Gordon, 7 East, 385 (1806); Whitaker v. Bank of England, 1 C. M. & R. 750 (183[illegible]; if at a merchant's place of business, then within ordinary business hours: Barclay v. Bailey, 2 Camp. 527 (1810), time 8 p.m.; Morgan v. Davison, 1 Stark. 114 (1815), time 6.30 p.m.; Allen v. Edmundson, 2 Ex. 723 (1848); if at a private house, probably a presentment up to bed-time would be sufficient: Triggs v. Newnham, 10 Moore, 249 (1825), time 8 p.m.; Wilkins v. Jadis, 2 B. & Ad. 188 (1831).

In Quebec it has been held that presentment at the closed doors of a bank after its usual office hours was not sufficient to base a protest upon: Watters v. Reiffenstein, 16 L. C. R. 297 (1866).

In New Brunswick where a note was payable at a "store," the only evidence was that when the holder went to present it the store was closed. It was held that i[illegible] he absence of evidence it might be inferred that it was closed in the due course of business, and that the presentment was not made at a reasonable time: Patterson v. Tapley, 9 N. B. (4 Allen) 292 (1859). Presentment at the door of a store which was closed at 5 p.m. held sufficient: Reed v. Kavanagh, 9 N. B. (4 Allen) 457 (1859).

In Massachusetts a presentment at the maker's residence, ten miles from Boston, at 9 p.m. was held sufficient, although he and his family had retired: Farnsworth v. Allen, 4 Gray, 453 (1855). In Maine a presentment at the maker's house a few minutes before midnight, when he was wakened up, was held insufficient. Dana v. Sawyer, 22 Me. 244 (1843).

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A note was payable at the Mechanics' Bank, New York city. The bank closed at 3 o'clock, but the clerks remained after that hour, and notes were presented and paid or refused. It was held that though the presentment was out of banking hours, it was sufficient if there was a person there authorized to give the holder an answer: Utica v. Smith, 18 Johns. 230 (1820).

Presentment at place specified.

(*d*) A bill is presented at the proper place :—

(1) Where a place of payment is specified in the bill or acceptance, and the bill is there presented; Imp. Act, s. 45 (1) (*a*).

The words "or acceptance" are not in the Imperial Act. According to Chalmers the word "bill" includes acceptance. He says, p. 148: "The place of payment may be specified either by the drawer or the acceptor": Gibb v. Mather, 2 Cr. & J. 254 (1832); Saul v. Jones, 1 E. & E. 59 (1858) Where a bill was payable at the office of the acceptor, Swansea, and was presented to him personally at Newport, it was held that an indorser was not liable: Beirnstein v. Usher, 11 T. L. R. 356 (1895). In England it is only when the acceptance states that the bill is to be paid at a particular place and not elsewhere that it must be presented there. So also formerly in Ontario as to both bills and notes, and in Prince Edward Island as to bills: see ante p. 103.

In Canada under the Act it is now sufficient to name the place of payment in the bill or acceptance without the additional words: section 19, s-s. 2 (*a*).

When a place of payment is named it should be presented there: C. C. Art. 2307; O'Brien v. Stevenson, 15 L. C. R. 265 (1865); Ferrie v. Rykman, Draper U. C. 61 (1830); Driggs v. Waite, 6 U. C. O. S. 310 (1842); Darling v. Gillies, 20 N. S. 423, 9 C. L. T. 120 (1888); Clayton v McDonald, 25 N. S. 446 (1893); Biggs v. Wood, 2 Man. 272 (1885); Philpott v. Bryant, 3 C. & P. 244 (1827).

If the bill is at the bank or other place of payment at its maturity, and the acceptor has no assets there, this is sufficient: Bailey v. Porter, 14 M. & W. 44 (1845); Merchants Bank v. Mulvey, 6 Man. 467 (1890). § 45.

The rule in the United States is the same as that now settled in Canada: Daniel, §§ 643, 644; Bank of U. S. v. Smith, 11 Wheaton (U. S.) 171 (1826); Cox v. National Bank, 100 U. S. (10 Otto) 712 (1879).

Where a person accepts a bill payable at his own bank, it is in effect an order to the bank to pay it unless notified to the contrary, and to charge it to his account: Robarts v. Tucker, 16 Q. B. 560 (1851); Bank of England v. Vagliano, [1891] A. C. 107.

If a bill is payable at a bank in a town where there is a clearing-house, it has been held in England that presentment through the clearing-house is sufficient: Reynolds v. Chettle, 2 Camp. 596 (1811); Harris v. Packer, 3 Tyr. 370 (1833); Boddington v. Schlenker, 4 B. & Ad. 752 (1833).

If alternative places are named it is sufficient to present it at one: Beeching v. Gower, Holt N. P. C. 313 (1816).

A note made in Boston and payable "at any bank" means any bank in Boston: Baldwin v. Hitchcock, 12 N. B. (1 Han.) 310 (1869).

A note dated at Brandon, Man., and made payable "at the Imperial Bank," is payable at the office of that bank in Brandon, and not at the head office in Toronto: Commercial Bank v. Bissett, 7 Man. 586 (1891).

(2) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented; *No place, but address.*

(3) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business, if known, and if not, at his ordinary residence, if known; *No place, and no address.*

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Other cases.

(4) In any other case, if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence: Imp. Act, s. 45 (4) (*b*) (*c*) (*d*); C. C. (2308).

These rules have been generally followed in Canada England and the United States.

A note payable generally was left for collection at a bank in the town where the maker lived. Before it matured he left town. A clerk went to present it at the house where he formerly lived, and could not learn there where he had gone to. He had heard before the note matured that the maker had left town, but heard different reports as to where he had gone. No enquiry was made at any of these places. It was proved that his leaving was no secret, and his business partner was not asked as to his whereabouts. Held, that reasonable diligence was not used and the indorser was released: Browne v. Boulton, 9 U. C. Q. B. 64 (1851).

The maker of a promissory note, a merchant, having absconded before the note became due and closed his store, it was held that presentment at his late dwelling-house was sufficient without proof of presentment at the store, or that the store remained closed on the day the note fell due: Robinson v. Taylor, 4 N. B. (2 Kerr) 198 (1843).

The maker of a note was proved to have occupied an office up to May 1st, after which there was no direct evidence of occupation, but his desk remained there as before. Held, in the absence of any proof of his having changed his office, that presentment of the note there after the 1st of May was sufficient: Kinnear v. Goddard, 9 N. B. (4 Allen) 559 (1860).

See Fitch v. Kelly, 44 U. C. Q. B. 587 (1879); Evans v. Foster, 13 N. S. 66 (1879); Sharp v. Power, 33 N. S. 371 (1900); Hine v. Allely, 1 N. & M. 433 (1833); Buxton v. Jones, 1 M. & Gr. 83 (1840); McGruder v. Bank of Washington, 9 Wheaton (U. S.) 598 (1824); Sussex Bank v.

Baldwin, 2 Harrison (N. J.), 487 (1840); West v. Brown, 6 Ohio St. 542 (1856); Granite Bank v. Ayers, 16 Pick. (Mass.) 392 (1835). § 45.

Sufficient present-ment.

3. Where a bill is presented at the proper place, and, after the exercise of reasonable diligence, no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required: Imp. Act, s. 45 (5).

It is the duty of the acceptor to have some person at the proper place, on the day a bill matures, to pay it. If no person is there prepared to pay, or authorized to refuse payment, or if the place be closed during reasonable hours, no further presentment is required, and the bill may be treated as dishonored: Hine v. Allely and Buxton v. Jones, supra, Crosse v. Smith, 1 M. & S. at p. 554 (1813).

Before the Act it was considered that where a bill is payable at a bank which has ceased to exist or which has closed that particular office, it is payable generally: Becher v. Amherstburg, 23 U. C. C. P. 602 (1874); McRobbie v. Torrance, 5 Man. L. R. 114 (1888).

Acceptors not partners.

4. Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all: Imp. Act, s. 45 (6).

Chalmers says, p. 149: "This is probably declaratory, but the point was not clear. Of course, if he pays, or in refusing payment, acts as the agent of the others, that is enough." Presentment should be made according to sub-section 2 (*d*) (2) (3) (4) ante. If they are in different places so that presentment cannot be made to all on the day of maturity the bill should be presented to at least one on that day and to the others as soon as practicable. The case is more likely to arise with joint makers of a note payable generally. See Willis v. Green, 5 Hill, 232 (1843); Arnold

§ 45. v. Dresser, 8 Allen (Mass.), 435 (1864); Union Bank v. Willis, 8 Metc. 504 (1844); Blake v. McMillen, 33 Iowa, 150 (1871); Gates v. Beecher, 60 N. Y. 523 (1875); Britt v. Lawson, 15 Hun (N. Y.) 123 (1878).

Where drawee dead.

5. Where the drawee or acceptor of a bill is dead and no place of payment is specified, presentment must be made to a personal representative, if such there is, and with the exercise of reasonable diligence he can be found: Imp. Act, s. 45 (7).

Presentment for acceptance in such a case is excused, but may be made: section 41. In the case of payment it must be presented to the personal representative if at all practicable. See Caunt v. Thompson, 7 C. B. 400 (1849); Dana v. Bradley, 10 N. B. (5 Allen) 292 (1862).

Through post office.

6. Where authorized by agreement or usage, a presentment through the post office is sufficient: Imp. Act, s. 45 (8).

It is a customary and legal method for a bank to present through the mail a cheque drawn on one of its correspondents: The Queen v. Bank of Montreal, 1 Exch. Can. 154 (1886).

In England and the United States such a usage has existed for many years, especially in the case of cheques. See Hare v. Henty, 10 C. B. N. S. 65 (1861); Prideaux v. Criddle, L. R. 4 Q. B. at p. 461 (1869); Heywood v. Pickering, L. R. 9 Q. B. at p. 432 (1874); Windham Bank v Norton, 22 Conn. 214 (1852); Be·g. v. Abbott, 83 Penn. St. 177 (1876); Shipsey v. Bowery National Bank, 59 N. Y. 485 (1875).

No place in city, etc., specified.

7 Where the place of payment specified in the bill or acceptance is any city, town or village, and no place therein is specified, and the bill is presented

at the drawee's or acceptor's known place of business or known ordinary residence therein, and, if there is no such place of business or residence the bill is presented at the post office, or principal post office in such city, town or village, such presentment is sufficient. § 46.

There is no corresponding clause in the Imperial Act, and it is new law in Canada: Commons Debates, 1890, p. 1474. The former practice in England when the drawer or acceptor had no place of business or residence, was to present it at all the banks in the place: Hardy v. Woodroofe, 2 Stark. 319 (1818). This clause furnishes a very simple rule for a place where there is a large number of banks, or where there is no bank at all.

46. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence: when the cause of delay ceases to operate, presentment must be made with reasonable diligence: Imp. Act, s. 46 (1). Excuse for delay in presentment for payment.

The present sub-section mentions the circumstances under which delay is excused, while the cause of delay exists, the following one, those under which presentment is dispensed with entirely.

ILLUSTRATIONS.

The following have been recognized as valid excuses for such delay:—

1. A request from the drawer or indorser sought to be charged: Burnett v. Monaghan, 1 R. C. 473 (1871); Lord Ward v. Oxford Ry. Co., 2 DeG. M. & G. 750 (1852).

2. A note was lying at a branch bank where it was payable. The new agent was not aware of its being there until noon of the day after maturity, when he had it protested and notice given. Held, sufficient to bind the indorser: Union Bank v. McKilligan, 4 Man. 29 (1886).

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3. The death of the holder: Rothschild v. Currie, 1 Q. B. at p. 47 (1841); Pothier, Change, No. 144; Nouguier, §§ 1107, 1108.

4. A state of siege or war, rendering it impracticable: Patience v. Townley, 2 Smith, 223 (1805); Bond v. Moore, 93 U. S. (3 Otto) 593 (1876); 3 Randolph, § 1324.

5. A moratory law, passed in consequence of war, postponing the maturity of bills 3 months: Rouquette v. Overmann, L. R. 10 Q. B. 525 (1875).

6. Delay in the post office where it was mailed in ample time: Windham Bank v. Norton, 22 Conn. 213 (1852); Pier v. Heinrichschoffen, 29 Am. Rep. 501 (1877).

When such presentment is dispensed with.

2. Presentment for payment is dispensed with—

(a) Where, after the exercise of reasonable diligence, presentment, as required by this Act cannot be effected;

When impracticable.

The fact that the holder has reason to believe that the bill will, on presentment, be dishonored, does not dispense with the necessity for presentment: Imp. Act, s. 46 (2) (*a*).

The dispensing with presentment for payment under the present sub-section should be distinguished from the delay in presentment which is excused under the preceding clause. In many of the cases the distinction is not kept in mind. The circumstances which excuse delay in notice of dishonour or dispense with it are to be found in section 50.

The different modes in which presentment may be made, and the order in which they should be attempted, are set out in section 45. If after the exercise of reasonable diligence, a bill cannot be presented in any one of these ways, presentment is dispensed with entirely: Forward v. Thompson, 12 U. C. Q. B. 194 (1854).

Whether due diligence has been used is a mixed question of law and fact: Perley v. Howard, 4 N. B. (2 Kerr) 518 (1844).

ILLUSTRATIONS. § 46.

The following have been held not to be sufficient reasons for dispensing with presentment:—

1. The fact of the bill being overdue when indorsed: Davis v. Dunn, 6 U. C. Q. B. 327 (1850).

2. The insolvency of the acceptor: Quebec Bank v. Ogilvy, 3 Dorion 200 (1883); Esdaile v. Sowerby, 11 East 117 (1809); Bowes v. Howe, 5 Taunt. 30 (1813); Sands v. Clarke, 8 C. B. 751 (1849). Contra, Venner v. Futvoye, 13 L. C. R. 307 (1863); but now see the second part of clause (a) above.

3. The dangerous illness of the maker of the note: Nowlin v. Roach, 4 N. B. (2 Kerr) 337 (1843).

4. Notice that the acceptor will not pay when due: Baker v. Birch, 3 Camp. 107 (1811); Hill v. Heap, D. & R. N. P. C. 57 (1823); Ex parte Bignold, 1 Deacon, 712 (1836). See also Nicholson v. Gouthit, 2 H. Bl. 609 (1796).

5. The fact of an acceptor being abroad, when the agent who accepted for him is at the place where the bill was addressed and accepted: Philips v. Astling, 2 Taunt. 206 (1809).

(*b*) Where the drawee is a fictitious person: Imp. Act, s. 46 (2) (*b*). Fictitious drawee.

Where the drawee is a fictitious person the holder may treat the instrument as a promissory note: section 5, s-s. 2; Smith v. Bellamy, 2 Stark. 223 (1817).

The fact of the drawee not having capacity to contract does not dispense with presentment for payment. The holder may treat such a bill as a promissory note: section 5, s-s. 2; and need not present it for acceptance: section 41, 2 (*a*); but it may be that it will be paid if presented and the drawer and indorsers thereby discharged.

(*c*) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented: Imp. Act, s. 46 (2) (*c*). Drawee not bound to pay.

§ 46. A bill accepted for the accommodation of the drawer need not be presented in order to charge him, where he has not provided funds to meet it: Stayner v. Howatt, 15 N. S. (3 R. & G.) 267 (1882); Terry v. Parker, 6 A. & E. 502 (1837); see Bowes v. Howe, 5 Taunt. 30 (1813); Wirth v. Austin, L. R. 10 C. P. 689 (1875); and in re Boyse, Crofton v. Crofton, 33 Ch. D. 612 (1886). It should be presented to charge the indorsers: Knapp v. Bank of Montreal, 1 L. C. R. 252 (1850); Saul v. Jones, 1 E. & E. 59 (1858).

Bill for accommodation of indorser.

(*d*) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented: Imp. Act, s. 46 (2) (*d*).

Where a bill was made and accepted for the accommodation of the last indorser and he made no provision for it, he is liable without presentment but the prior indorsers are not: In re Boutin, Q. R. 12 S. C. 186 (1897); Turner v. Samson, 2 Q. B. D. 23 (1876); see Foster v. Parker, 2 C. P. D. 18 (1876).

Waiver

(*e*) By waiver of presentment, express or implied. Imp. Act, s. 46 (2) (*e*).

Waiver is binding without consideration. It may be either before or after the time for presentment. It may be in writing or verbal, or inferred from conduct or circumstances. It may be in or on the bill itself: section 16 (*b*).

ILLUSTRATIONS.

1. A declaration of inability to pay and request for time is a waiver as regards the party making it: McDonnell v. Lowry, 3 U. C. O. S. 302 (1833).

2. A promise to pay after the bill is due with knowledge of the facts is a waiver: McIver v. McFarlane, Taylor U. C. 113 (1824); Macaulay v. McFarlane, Rob. & Jos. Dig. 493 (1840); McCuniffe v. Allen, 6 U. C. Q. B. 377 (1849); McCarthy v. Phelps, 30 ibid. 57

(1870); City Bank v. Hunter, 2 Rev. de Leg. 171 (1847); Johnson v. Geoffrion, 7 L. C. J. 125 (1863); Watters v. Lordly, 4 N. B. (2 Kerr) 13 (1842); Allen v. McNaughton, 9 N. B. (4 Allen) 234 (1858); St. Stephen B. Ry. Co. v. Black, 13 N. B. (2 Han.) 139 (1870); Colwell v. Robertson, 17 N. B. (1 P. & B.) 481 (1877); Whitehouse v. Bedell, 26 N. B. 40 (1886); Deering v. Hayden, 3 Man. 219 (1886); Hopley v. Dufresne, 15 East. 275 (1812); Croxon v. Worthen, 5 M. & W. 5 (1839); Armstrong v. Chadwick, 127 Mass. 156 (1879). § 47.

3. Where a bank suspended payment on the day a cheque should have been presented, and the drawer sued the bank for the full amount of his deposit, including this cheque, it was held that he had waived presentment and was liable: Blackley v. McCabe, 16 Ont. A. R. 295 (1889).

4. Waiver of presentment by the payee does not bind the drawer: McLellan v. McLellan, 17 U. C. C. P. 109 (1866).

5. Part payment is a waiver: Rice v. Bowker, 3 L. C. R. 305 (1853).

6. A promise by an indorser to pay a composition on a note if it was not paid at maturity, is not a waiver of presentment or of protest: Union Bank v. Gibeault, 12 Q. L. R. 145 (1886).

7. An offer to give new notes which the holder does not accept is not a waiver: Bank of New Brunswick v. Knowles, 4 N. B. (2 Kerr) 219 (1843).

8. The payee indorsed a note to plaintiff. The maker having absconded, plaintiff on the day of maturity took it to the payee, who handed it back to plaintiff, asking him to keep it. This was a waiver of presentment: Masters v. Stubbs, 9 N. B. (4 Allen) 453 (1860).

9. Waiver of demand of payment is waiver of presentment: Burton v. Goffin, 5 B. C. R. 454 (1897).

10. Waiver of notice of dishonor is not waiver of presentment: Hill v. Heap, D. & R. N. P. C. 57 (1823).

11. It is no defence that the party making the promise to pay did not know its legal effect: Third Nat. Bank v. Ashworth, 105 Mass. 503 (1870).

47. A bill is dishonored by non-payment (*a*) when it is duly presented for payment and payment is refused or cannot be obtained, or (*b*) when pre- Dishonor by non-payment.

§ 47. sentment is excused and the bill is overdue and unpaid:

Recourse against parties liable

2. Subject to the provisions of this Act, when a bill is dishonored by non-payment, an immediate right of recourse against the drawer, acceptor and indorsers accrues to the holder. Imp. Act, s. 47.

As to presentment for payment, see section 45; and as to when it is excused, section 46. As to when a bill is overdue, see sections 10 and 14. The provisions of the Act referred to in this section are sections 48 to 51, and 64 to 67.

In the Imperial Act the word acceptor is not used. Chalmers distinguishes between the right of recourse and the right of action. It has been held in England that the latter exists against a drawer or indorser only from the time when notice of dishonor is or ought to be received and not from the time when it is sent: Castrique v. Bernabo, 6 Q. B. 498 (1844).

An action instituted in the afternoon of the last day of grace, after dishonor, is premature: Demers v. Rousseau, Q. R. 1 S. C. 440 (1892); Wells v. Giles, 2 Gale, 209 (1836); Kennedy v. Thomas, [1894] 2 Q. B. 759; Wiesinger v. First Nat. Bank, 106 Mich. 291 (1895). Contra, Sinclair v. Robson, 16 U. C. Q. B. 211 (1858); Edgar v. Magee, 1 O. R. 287 (1882); Ontario Bank v. Foster, 6 L. N. 338 (1883); Leftley v. Mills, 4 T. R. 170 (1791); Estes v. Tower, 102 Mass. 66 (1869).

In Quebec the insolvency of the acceptor before the maturity of the bill makes it immediately exigible as against him: Lovell v. Meikle, 2 L. C. J. 69 (1853); Corcoran v. Montreal Abattoir Co., 6 L. N. 135 (1882); Ontario Bank v. Foster, 6 L. N. 398 (1883); Pelletier v. Deschenes, 1 R. J. 352 (1892); La Banque Nationale v. Martel, Q. R. 17 S. C. 97 (1899); but not as against an indorser: Guilbault v. Migné, 20 R. L. 597 (1891); Trottier v. Rivard, Q. R. 23 S. C. 526 (1903). Prescription does not, however, begin to run until

the time fixed for the maturity of the bill: Whitley v. Pinkerton, Q. R. 2 S. C. 256 (1892).

Where the acceptance is conditional the condition must be fulfilled or the acceptor is not liable: Dufresne v. Jacques Cartier Building Society, 5 R. L. 235 (1873); Fullerton v. Chapman, 8 N. S. (2 G. & O.) 470 (1871); Potters v. Taylor, 20 N. S. 362, 7 C. L. T. 434 (1888); Ontario Bank v. McArthur, 5 Man. 381 (1889); Gammon v. Schmoll, 5 Taunt. 344 (1814).

In an action on a bill or note payable at a particular place it is not necessary to show that there were not sufficient funds at the place named; all that is necessary, even as against an indorser, is to show presentment, non-payment and notice of dishonor: McDonald v. McArthur, 8 Ont. A. R. 553 (1883).

48. Subject to the provisions of this Act, when a bill has been dishonored by non-acceptance or by non-payment, notice of dishonor must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged: Imp. Act, s. 48.

Notice of dishonor and effect of non-notice.

The provisions of the Act which dispense with notice of dishonor in certain cases, and excuse delay in giving notice in others, are in section 50.

The rules governing notice of dishonor are to be found in section 49. As to when a bill is dishonored by non-acceptance or non-payment, see sections 43 and 47.

The liability of the drawer and indorsers of a bill being contingent upon its non-acceptance or non-payment, notice of dishonor must be given to them, save in the exceptional cases mentioned in section 50, in order to hold them liable.

By section 56, any person who signs a bill otherwise than as a drawer or acceptor, incurs the liabilities of an indorser to a holder in due course, and is subject to all the provisions of the Act respecting indorsers.

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Notice of dishonor.

Under French law, indorsers are discharged for want of notice, but a drawer is not, unless he can show that the drawee had funds to meet the bill: Code de Com. Art 170. Under the Act, it is only a drawer as to whom the drawee or acceptor is under no obligation to accept or pay the bill, that must prove this: section 46, s-s. 2 (*c*).

Mere knowledge of the dishonor of a bill is not enough to bind a drawer or indorser: Burgh v. Legge, 5 M. & W. at p. 422 (1839); Carter v. Flower, 16 M. & W. at p. 749 (1847). A notice in accordance with the rules in section 49 should be given where notice is not excused.

Before the Act, persons who became parties to bills as warrantors, have been held not entitled to the same notice as ordinary indorsers. As to their position now, see section 50, s-s. 2 (*b*), and section 56 and notes thereon.

ILLUSTRATIONS.

1. A bill was indorsed for the accommodation of the drawer. The drawee refused to accept, and the bill was protested for non-acceptance and non-payment. Notices of both were sent to the drawer, but of non-payment only to the indorser. Held, that the indorser was discharged, although the drawer had no effects in the hands of the drawee: Gore Bank v. Craig, 7 U. C. C. P. 344 (1857).

2. It is only the drawer or indorser who has not been notified that can claim such discharge: Grant v. Winstanley, 21 U. C. C. P. 257 (1871).

3. A bank's notary received for protest a note made and indorsed for his accommodation which the bank had discounted for him. Instead of protesting it he gave it up to the parties, saying he had paid it. Some months after this he absconded. Held, that by laches of the bank both maker and indorser were discharged: Canadian Bank of Commerce v. Green, 45 U. C. Q. B. 81 (1880).

4. The omission to give notice of non-acceptance is not cured by notice of non-acceptance given with the notice of non-payment: Jones v. Wilson, 2 Rev. de Leg. 28 (1813).

5. The indorser of a bill of exchange is in all cases entitled to notice, even when the drawee has no effects in his hands: Griffin v. Philips, 2 Rev. de Leg. 30 (1821).

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6. An accommodation indorser is entitled to notice of dishonor, and is discharged by the absence of it: Merchants' Bank v. Cunningham, Q. R. 1 Q. B. 33 (1892).

7. A person who is interested in the bill to the knowledge of the holder, but whose name is not on it, is not entitled to notice of dishonor: Anderson v. Archibald, 9 N. S. (3 G. & O.) 88 (1872); Swinyard v. Bowles, 5 M. & S. 62 (1816); Hitchcock v. Humfrey, 5 M. & Gr. 559 (1843); Walton v. Mascall, 13 M. & W. 72 (1844); Carter v. White, 25 Ch. D. 666 (1883).

8. A bill is dishonored and the holder gives notice to the indorser but not to the drawer. If the indorser in turn sends a notice to the drawer, the holder can sue both indorser and drawer. If such notice be not given the holder can sue the indorser, but neither of them can sue the drawer: Rickford v. Ridge, 2 Camp. 537 (1810); Miers v. Brown, 11 M. & W. 372 (1843); Berridge v. Fitzgerald, L. R. 4 Q. B. at p. 642 (1869).

9. Where the same person was secretary of two companies that were parties to a bill dishonored by non-payment, his knowledge as secretary of one company that the bill was dishonored is not notice to the other, unless it was his duty as secretary of the former, to communicate the fact to the other company: In re Fenwick Stobart & Co., Deep Sea Fishery Co.'s Claim, [1902] 1 Ch. 507.

10. Where the drawer or an indorser of a bill is discharged for want of notice of dishonor, he is also discharged from any liability on the consideration for the bill: Bridges v. Berry, 3 Taunt. 130 (1810); Peacock v. Pursell, 14 C. B. N. S. 728 (1863); Hart v. McDougall, 25 N. S. 38 (1892). So also is any person who is a warrantor or surety for him: Anderton v. Beck, 16 East 248 (1812); Hopkins v. Ware, L. R. 4 Ex. 268 (1869).

Provided that—(*a*) Where a bill is dishonored by non-acceptance, and notice of dishonor is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission: Imp. Act, s. 48 (1). *Notice of non-acceptance not given*

A person acquiring such a bill might become a holder in due course if it bore no mark of dishonor, and he was not aware of the dishonor: section 29; Roscow v. Hardy, 12 East. 434 (1810); Dunn v. O'Keefe, 5 M. & S. 282 (1816); Whitehead v. Walker, 9 M. & W. 506 (1842).

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Notice of non-acceptance sufficient.

(*b*) Where a bill is dishonored by non-acceptance and due notice of dishonor is given, it shall not be necessary to give notice of a subsequent dishonor by non-payment, unless the bill shall in the meantime have been accepted. Imp. Act, s. 48 (2).

The subsequent acceptance referred to here may be either an acceptance by the drawee, or by an acceptor for honor or referee in case of need: section 66.

Rules as to notice of dishonor.

49. Notice of dishonor, in order to be valid and effectual, must be given in accordance with the following rules: Imp. Act, s. 49.

These rules are taken from section 49 of the Imperial Act, with the exception of that in sub-section 4, which declares a notice of protest or dishonor to be sufficient if posted on the day after the protest and dishonor, addressed to the party at his usual address or residence or at the place where the bill is dated unless he has given some other address on the bill. This latter provision obviates many of the difficulties that arise, which have been urged as reasons for delay in giving notice or for excusing notice altogether, in England and the United States, where they have no law making the place where the bill is dated a sufficient address. See the notes and illustrations under sub-section 4.

Sub-section 10 of the Imperial Act allowing notice to be given to the trustee of a bankrupt was omitted as being inapplicable to Canada, there being no bankrupt law here, and the Act not recognizing or taking notice of the provincial Acts relating to assignments for the benefit of creditors, or the appointment of trustees or curators to the estates of those unable to pay their debts.

An indorser who has made an abandonment or assignment under the Quebec Code is not liable without notice of dishonor, and his curator cannot bind him by waiver of pro-

test: Denenberg v. Mendelssohn Q. R. 23 S. C. 128 (1903): § 49.
Molsons Bank v. Steel, ibid. 316 (1903).

(*a*) The notice must be given by or on behalf of the holder, or on behalf of an indorser who, at the time of giving it, is himself liable on the bill: By holder or indorser

(*b*) Notice of dishonor may be given by an agent either in his own name, or in the name of any party entitled to give notice, whether that party is his principal or not: Imp. Act, s. 49 (1) (2); C. C. 2326. By agent.

The holder or his agent may give notice to all the antecedent parties entitled to notice, or only to such of them as he may desire to hold liable on the bill. In the latter case, an indorser receiving notice may thereupon give notice to any additional parties entitled to notice, whom he desires to hold liable: sub-sections 2 and 3. The usual practice in Canada is for the holder to give notice to all prior parties who have not waived notice on the bill.

ILLUSTRATIONS.

1. When a note payable at a bank is sent there for collection, the protest may properly be made and notice given by the bank although it has no interest in the note: Wilson v. Pringle, 14 U. C. Q. B. 230 (1856); Girvan v. Price, 8 N. B. (3 Allen) 409 (1857); Howard v. Godard, 9 N. B. (4 Allen) 452 (1860). Also by any person authorized to receive payment: Rowe v. Tipper, 13 C. B. 249 (1853).

2. An indorser is notified of dishonor by a person who formerly held the bill, but had not at the time of dishonor any such relation as above indicated. He is released: Stewart v. Kennett, 2 Camp. 177 (1809); Chanoine v. Fowler, 3 Wend. 173 (1829).

3. The drawee may act as agent for a party entitled to give notice: Rosher v. Kieran, 4 Camp. 87 (1814), as modified by Harrison v. Ruscoe, 15 M. & W. at p. 235 (1846). If, however, the drawee be not properly authorized the notice is bad: Stanton v. Blossom, 14 Mass 116 (1817).

§ 49. 4. An indorser who is discharged by notice coming one day late gives notice in time to the drawer. The latter is not liable: Turner v. Leech, 4 B. & Ald. 451 (1821).

5. A notice by an attorney is sufficient, although he does not say for whom he is acting: Woodthorpe v. Lawes, 2 M. & W. 109 (1836).

6. An indorser who holds a bill as agent for the indorsee may give notice in his own name: Lysaght v. Bryant, 9 C. B. 46 (1850).

7. Notice by a party liable is good, although he is not at the time certain of the dishonor or of his own liability: Jennings v. Roberts, 4 E. & B. 615 (1855).

8. If the holder be dead, notice should be given by his personal representative: White v. Stoddard, 11 Gray, 258 (1858).

Notice benefits other parties.

(*c*) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given;

(*d*) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given: Imp. Act, s. 49 (3) (4).

The holder of a bill is entitled to avail himself of notice of dishonor given by any party to the bill: Chapman v. Keane, 3 A. & E. 193 (1835), overruling Tindal v. Brown, 1 T. R. 167 (1786); Wilson v. Swabey, 1 Stark. 34 (1815); Stafford v. Yates, 18 Johns. 327 (1820); Brailsford v. Williams, 15 Maryland, 157 (1859); Palen v. Shurtleff, 9 Metc. 581 (1845).

Mode of notice and terms.

(*e*) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill and intimate that the bill has been dishonored by non-acceptance or non-payment: Imp. Act, s. 49 (5).

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The tendency of modern decisions in England has been to accept as sufficient any notice however informal, from which the party receiving it may know that the bill, on which he is conditionally liable, has been dishonored. In Solarte v. Palmer, 1 Bing. N. C. 194 (1834), the House of Lords held that a notice must inform the holder either in terms or by necessary implication, that the bill had been presented and dishonored. Chalmers says, p. 161: "Since 1841 it does not appear that any written notice of dishonor has been held bad on the ground of insufficiency in form." Under the Act very informal notices will suffice and the notice in the case referred to by Chalmers, Furze v. Sharwood, 2 Q. B. 388 (1841), would no doubt now be held to be good.

In the first schedule to the Act are given forms (G. and H.) of notice of noting and of protest, for non-acceptance or non-payment.

ILLUSTRATIONS.

1. A notice that a foreign bill has been returned protested is a sufficient notice of non-acceptance, without sending a copy of the protest with the notice: O'Neil v. Perrin, Rob. & Jos. Dig. 496 (1839); Goodman v. Harvey, 4 A. & E. 870 (1836).

2. A notice to the indorser must, either in express terms or by necessary intendment, shew that the note has been presented for payment, and that payment has been refused: Bank of U. C. v. Street, Rob. & Jos. Dig. 496 (1841).

3. A notice to an indorser, describing the bill and saying that it "is due this day and unpaid, and as holder I look to you for payment," is sufficient: Bank of U. C. v. Street, 3 U. C. Q. B. 29 (1846), Blinn v. Dixon, 5 U. C. Q. B. 580 (1848); Robson v. Curlewis, 2 Q. B. 421 (1842). Also a verbal message to the drawer to the same effect: Metcalfe v. Richardson, 11 C. B. 1011 (1852).

4. What is or is not a sufficient notice of the dishonor of a bill or note, when the facts are undisputed, is a question of law: Bank of U. C. v. Smith, 4 U. C. Q. B. 483 (1847).

5. A notice to an indorser stating that the note was duly protested for non-payment, is sufficient without saying that it was presented: Blain v. Oliphant, 9 U. C. Q. B. 473 (1852).

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6. A notice describing the note, and adding, "you will in consequence of non-payment be held responsible," is sufficient: Harris v. Perry, 8 U. C. C. P. 407 (1858).

7. The following letter from a bank manager to a customer who had deposited a cheque for collection is sufficient: "I am now advised that it (the cheque) has not yet been covered by Bank of P. E. Island. In case of its being returned here unpaid, I deem it proper to notify you of the circumstances, as I will be required in that event to reverse the entry and return it to the department." The Queen v. Bank of Montreal, 1 Exch. Can. 154 (1886).

8. The following notice was held sufficient to bind an indorser and his wife, whose agent he was: "I beg to advise you that T. C. L.'s note for $3,500 in your favor and indorsed by yourself and wife was due yesterday. As I have not received renewal, will you kindly see that same is forwarded with cheque for discount." Counsell v. Livingstone, 4 O. L. R. 340 (1902).

9. A notice giving other particulars of the note but not mentioning the amount is sufficient, when there is no evidence of the existence of another note: Handyside v. Courtney, 1 L. C. J. 250 (1857).

10. A notice to a female indorser, beginning "Sir," is sufficient if it reached her: Mitchell v. Browne, 9 L. C. J. 168 (1865), overruling Seymour v. Wright, 3 L. C. R. 454 (1852).

11. Where the notice of dishonor does not state that a foreign bill has been protested, the indorser will not be liable: Delaney v. Hall, 3 N. S. (2 Thom.) 401 (1858); see Rogers v. Stephens, 2 T. R. 713 (1788); Gale v. Walsh, 5 T. R. 239 (1793); Robins v. Gibson, 1 M. & S. 288 (1813). Contra, Ex parte Lowenthal, L. R. 9 Ch. 591 (1874).

12. Where it was alleged that a notice of dishonor was sent by telegraph, but the contents of the telegram were not proved, and no evidence given of its having been received, the indorser was held to be discharged: McLean v. Garnier, 15 N. S. (3 R. & G.) 276 (1882).

13. The issue and service of a writ of summons is not a sufficient notice of dishonor to bind an indorser, although the writ was served on the same day that the note was dishonored: Commercial Bank v. Allan, 10 Man. 330 (1894).

14. A verbal notice by the holder at the drawer's house to his wife is sufficient without saying where the bill is lying: Housego v. Cowne, 2 M. & W. 348 (1837).

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15. If there be more than one bill to which the notice may refer, the onus is on the defendant to prove this fact: Shelton v. Braithwaite, 7 M. & W. 436 (1841); Gates v. Beecher, 60 N. Y. (Sickles) at p. 527 (1875).

16. A notice to an indorser describing the bill and stating that it lies at a certain place dishonored, is sufficient: King v. Bickley, 2 Q. B. 419 (1842).

17. The holder's clerk wrote to an indorser that J. C.'s acceptance due that day was unpaid, and requesting his immediate attention to it. Held, a sufficient notice of dishonor: Bailey v. Porter, 14 M. & W. 44 (1845). To the same effect, Armstrong v. Christiani, 5 C. B. 687 (1848); Everard v. Watson, 1 E. & B. 801 (1853); Paul v. Joel, 3 H. & N. 455; 4 H. & N. 355 (1859); Bain v. Gregory, 14 L. T. N. S. 601 (1866).

The spirit of the Act is in favor of holding any notice sufficient which would reasonably inform the party that the bill on which his name appears has been dishonored.

Return of bill sufficient.

(f) The return of a dishonored bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonor: Imp. Act, s. 49 (6).

Informal notice.

(g) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication; a misdescription of the bill shall not vitiate the notice, unless the party to whom the notice is given is in fact misled thereby: Imp. Act, s. 49 (7).

ILLUSTRATIONS.

1. A notice to a firm about a note alleged to be indorsed by them, held not to be sufficient to bind a partner who was the real indorser: Bank of Montreal v. Grover, 3 U. C. Q. B. 27 (1846).

2. The following errors have been held not to vitiate the notice, the correct particulars being sufficient to identify the bill or note:—a mistake in the due date of the bill or in its date: Blinn v Dixon, 5 U. C. Q. B. 580 (1848); Thorn v. Sandford, 6 U. C. C. P. 462 (1857); Low v. Owen, 12 ibid. 101 (1862); Cassidy v. Mansfield, 24 ibid. 383 (1874); Robinson v. Taylor, 4 N. B. (2 Kerr) 198 (1843); Mills v. Bank of U. S., 11 Wheat. (U. S.) 431 (1826); Smith v.

§ 49. Whiting, 12 Mass. 6 (1815);—giving a wrong amount: Thompson v Cotterell, 11 U. C. Q. B. 185 (1854); Bank of Alexandria v Swann, 9 Pet. (U. S.) 33 (1835);—giving the name of a party incorrectly: Girvan v. Price, 8 N. B. (3 Allen) 400 (1857); Harpman v. Child, 1 F. & F. 652 (1859); Dennistoun v. Stewart, 17 How. (U. S.) 606 (1854);—transposing the names of the drawer and acceptor: Mellersh v. Rippen, 7 Ex. 578 (1852);—calling a bill a note, or vice versa: Stockman v. Parr, 11 M. & W. 809 (1843);—naming the wrong bank or place where the bill was payable or was lying: Bromage v. Vaughan, 9 Q. B. 608 (1846); Rowlands v. Springett, 14 M. & W. 7 (1845).

3. A notice by holder to indorser in these terms:—"Messrs. H are surprised to hear that Mrs. G.'s bill was returned to the holder unpaid," followed by a visit from the indorser to the holder the same day, when he expressed his regret and promised to write to the other parties, was held sufficient: Houlditch v. Cauty, 4 Bing. N C. 411 (1838).

4. For other instances of imperfect written notices accompanied or followed by verbal communications, see East v. Smith, 4 D. & L 744 (1847); Chard v. Fox, 14 Q. B. 200 (1849); Jennings v. Roberts, 4 E. & B. 615 (1855); Viale v. Michael, 30 L. T. N. S. 463 (1874).

5. An unsigned notice in writing from the right person is sufficient: Maxwell v. Brain, 10 L. T. N. S. 301 (1864).

Notice given to party or his agent.

(*h*) Where notice of dishonor is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf; Imp. Act, s. 49 (8).

The agent should be some person designated for that purpose by the party, or in charge or employed at his office or residence.

ILLUSTRATIONS.

1. Delivery of a notice to a man cutting wood in the indorser's yard is insufficient, there being no evidence that the man was an inmate of the family, or that the indorser received the notice: Commercial Bank v. Weller, 5 U. C. Q. B. 543 (1848).

2. Where the maker of a note gave the wrong address of his accommodation indorser, a notice to the latter at the address given was held to be binding on him: McMurrich v. Powers, 10 U. C. Q. B 481 (1853).

3. Where an indorser goes to fill an office temporarily but leaves his family in his old home, a notice left there is sufficient: Ryan v. Malo, 12 L. C. R. 8 (1861). § 49.

4. Notice to the curator in Quebec will not bind the indorser: Denenberg v. Mendelssohn, Q. R. 23 S. C. 128 (1903): Molsons Bank v. Steel, ibid. 316 (1903).

5. Verbal notice to the solicitor of an indorser is insufficient: Crosse v. Smith, 1 M. & S. at p. 554 (1813).

6. Notice to the person who has indorsed the bill under a power of attorney is probably good notice to the indorser: Firth v. Thrush, 8 B. & C. at p. 391 (1828).

7. Notice to a clerk in the office of the indorser, who is a merchant, is sufficient: Allen v. Edmundson, 2 Ex. at p. 724 (1848).

8. Notice to a referee indicated by an indorser is not sufficient to bind the latter: Ex parte Prange, L. R. 1 Eq. at p. 5 (1865).

9. Information of dishonor received by the secretary of a company is not notice to him as the secretary of another company, unless it was his duty in the former capacity to communicate it to the latter company: In re Fenwick Stobart & Co., Ex parte Deep Sea F. Co. [1902] 1 Ch. 507.

10. Where a party has no office, and boards at a private boarding house, a notice left there with a fellow-boarder, in his absence, is sufficient: Bank of U. S. v. Hatch, 6 Pet. (U. S.) 250 (1832).

(*i*) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative, if such there is, and, with the exercise of reasonable diligence, he can be found: Imp. Act, s. 49 (9). Where party dead

Sub-section 4 provides that a notice posted shall not be invalid by reason that the party to whom it is addressed is dead. As the present clause is imperative where the death is known and a representative can be found, that sub-section will be limited to the cases where the party giving notice does not know of the death or cannot find such representative. Chalmers, p. 163, says there was no English decision on the point.

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ILLUSTRATIONS.

See also illustrations under sub-section 4, post.

1. A notice of non-payment, merely "To the executrix or executor of the late Mr. Jones, Toronto," is bad: Bank of B. N. A v. Jones, 8 U. C. Q. B. 86 (1850).

2. Where an indorser died intestate and no administrator had been appointed when the note matured, a notice addressed to him at his last residence was held good: Gillespie v. Marsh, 1 U. C. C. P. 453 (1852).

3. Where S., an indorser, died and notices were sent addressed to the "Administrators of S.'s estate, and B." and also at C., where the deceased had lived, and it appeared that they reached them, the estate was held liable: McKenzie v. Northrop, 22 U. C. C. P. 383 (1872).

4. The indorser, a married woman, died intestate. A notice was addressed to the husband as executor of his wife and received by him. The wife's estate was held liable: Merchants' Bank v. Bell, 29 Grant 413 (1881).

5. Where an indorser has recently died and no administrator or executor can be found, a notice addressed to the "legal representative" of deceased is sufficient: Pillow v. Hardeman, 3 Humphrey (Tenn.) 538 (1842).

6. A notice addressed to one of several executors or administrators is sufficient: Bealls v. Peck, 12 Barb. 245 (1851).

Notice to non-partners.

(*j*) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others: Imp. Act, s. 49 (11).

The contrary was held in Upper Canada: Bank of Michigan v. Gray, 1 U. C. Q. B. 422 (1841). Chalmers says, p. 164, that there was no English decision on the point. The Act adopted the rule in the United States: Willis v. Green, 5 Hill (N. Y.) 232 (1843); Miser v. Trovinger, 7 Ohio St. 281 (1857); Boyd v. Orton, 16 Wis. 495 (1863).

(*k*) The notice may be given as soon as the bill is dishonored, and must be given not later than the next following juridical or business day: Imp. Act, s. 49 (12). **49.**

Time for notice.

The Imperial Act provides that notice must be given "within a reasonable time" after dishonor. If the parties live in the same place it should be sent so as to arrive the day after dishonor, if in different places, so as to go off by next day's post if there is one. A notice by telegram on the second day after dishonor has been held sufficient: Fielding v. Corry, [1898] 1 Q. B. 268. The Canadian Act has adopted the old rule in force in Ontario: R. S. C. c. 123, s. 23. In Quebec the holder had three days after protest to give notice: C. C. Art. 2330.

For questions as to time of giving notice under the old law, see Nassau v. O'Reilly, Rob. & Jos. Dig. 198 (1839); Bank of B. N. A. v. Ross, 1 U. C. Q. B. 199 (1843); Chapman v. Bishop, 1 U. C. C. P. 132 (1852); Brent v. Lees, 2 Rev. de Leg. 335 (1820).

See also illustrations under s-s. 4, post.

2. Where a bill, when dishonored, is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal; if he gives notice to his principal, he mus[illegible] within the same time as if he were the ho[illegible] principal, upon receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder: Imp. Act, s. 49 (13).

Dishonored bill in hands of agent.

This and the following sub-section lay down the rule for successive notices of dishonor, a practice not followed in Canada before the Act, at least in Ontario or Quebec, where the usage has been for the holder at the time of dishonor to give notice to all the parties through the post office in accordance with the rules laid down in sub-section 4.

See illustrations under the next sub-section.

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Notice to antecedent parties

3. Where a party to a bill receives due notice of dishonor, he has, after the receipt of such notice, the same period of time for giving notice to antecedent parties that the holder has after the dishonor: Imp. Act, s. 49 (14).

Each party receiving notice of dishonor has the whole of the following business day to send notice to any party to the bill whom he desires to hold liable.

As the usage in Canada has been for the holder to give notice to all parties entitled to it, he should either do so still, or let the parties whom he notifies know that he is not giving notice to the others so that they may take steps to protect themselves if necessary.

See note to sub-section 4, as to indorsers who do not give their address.

ILLUSTRATIONS.

1. A holder in the country gives to his banker there a bill payable in London. The banker sends it to his London agent, who presents it and gives notice of dishonor to the country banker. The latter, the day after getting notice, notifies the customer, who in turn notifies his indorser. The latter has received due notice: Bray v. Hadwen, 5 M. & S. 68 (1816).

2. An indorser received a notice of dishonor from the post office on Sunday. Held, that he had until Tuesday to give notice to antecedent parties, as he was not bound to open his letter until Monday morning: Wright v. Shawcross, 2 B. & Ald. at p. 501, n. (1819).

3. Different branches of a bank are considered as distinct parties for the purpose of this sub-section: Clode v. Bayley, 12 M. & W. 51 (1843); Prince v. Oriental Bank, 3 App. Cas. at p. 332 (1878); Steinhoff v. Merchants' Bank, 46 U. C. Q. B. 25 (1881).

4. A party pays a bill supra protest for the honor of an indorser who is abroad and to whom he posts the bill the same day. The latter by return post sends notice of dishonor to the drawer. Although this is not received until six days after dishonor it is in time: Goodall v. Polhill, 1 C. B. 233 (1845).

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5. The holder, in order to charge an earlier party by notice from himself, must send the notice as promptly as if to his own immediate indorser: Rowe v. Tipper, 13 C. B. 249 (1853).

6. The one day allowed by law to give notice cannot be extended to allow an agent and his principal to confer: Ex parte Prange, L. R. 1 Eq. 1 (1865).

When notice shall be given.

4. Notice of the protest or dishonor of any bill payable in Canada shall, notwithstanding anything in this section contained, be sufficiently given if it is addressed in due time to any party to such bill entitled to such notice, at his customary address or place of residence or at the place at which such bill is dated, unless any such party has, under his signature, designated another place; and in such latter case such notice shall be sufficiently given if addressed to him in due time at such other place; and such notice so addressed shall be sufficient, although the place of residence of such party is other than either of such above mentioned places; and such notice shall be deemed to have been duly served and given for all purposes if it is deposited in any post office, with the postage paid thereon, at any time during the day on which such protest or presentment has been made, or on the next following juridical or business day; such notice shall not be invalid by reason of the fact that the party to whom it is addressed is dead: R. S. C. c. 123, ss. 5, 23; C. C. 2328.

Through post office

Source of law.

The Imperial Act has no provision exactly corresponding to this sub-section. It is taken in part from section 5 of chapter 123 R. S. C., which was first enacted in 1874 and applied to the whole of Canada; and in part from section 23 of that chapter which applied to Ontario alone, and Article 2328 of the Civil Code which applied to Quebec. The last

§ 49. clause was added in harmony with the decision of the Supreme Court in the case of Cosgrave v. Boyle, noted below. If the death of the party is known to the party giving notice, then the notice should be given to the personal representative of the deceased, if he can be found: clause (*k*) ante.

Notice through the post.

Heretofore in Canada the usage has been for the holder at the time of dishonor to send notice to all parties entitled to it through the post, addressed to them at the place at which the bill or note is dated. This is very frequently not the real address of the indorsers, especially when maker and payee or drawer and drawee reside in different parts of the country, and a great many of such notices never reach the parties to whom they are addressed. If the holder should not send a notice to all the parties, an indorser who in such a case has neglected to give his real address, may find that his recourse against antecedent parties is entirely gone. By sub-section 5 when such a notice is addressed and posted, the sender is deemed to have given due notice, and by the present sub-section notice is "sufficiently given" when given in this manner. It is not likely that in such a case where the notice does not reach an indorser that he will be held to have "received due notice" within the meaning of sub-section 3 ante, so as to make the delay run as to notice to antecedent parties: but the miscarriage being owing to his own fault and neglect he might be held responsible under certain circumstances. At all events, in such a case, he should lose no time in giving notice to antecedent parties, if the holder has not notified them.

In England the holder must use due diligence to ascertain the correct address of the drawer and indorsers. It has been laid down that while there might not be any reason for addressing a notice of dishonor to an indorser at the place where the bill was dated, yet it was proper to leave it to a jury whether a notice to the drawer might not reasonably be addressed there: Burmester v. Barron, 17 Q. B. 828 (1852); Clarke v. Sharpe, 3 M. & W. 166 (1838); Mann v. Moors, Ry. & M. 249 (1825).

In the United States it has generally been held that the place of date of a bill is not even prima facie evidence of the address of an indorser, and if it appear that it is not the real address of the drawer the holder must show that he had made due enquiry: Barnewell v. Mitchell, 3 Conn. 101 (1819; Lowery v. Scott, 24 Wend. (N. Y.) 358 (1840); Pierce v. Struthers, 27 Penn. St. 249 (1856). Where a bill is sent by a Canadian holder to the United States for collection and is dishonored, the custom is to return the bill to the owner with the protest and the notices, and let him send them to the proper addresses. § 49.

In New Brunswick before the Dominion Act of 1874, it was held that a posted notice addressed to the drawee at the place where the bill was dated was not valid in the absence of proof that a notice sent to that office would reach him: Balloch v. Binney, 5 N. B. (3 Kerr) 440 (1847).

Indorsers who may wish to look to prior parties should be careful to see (1) that their proper address is given, and (2) that notice of dishonor has been given to such prior parties, and if not, to give it themselves within the legal delay.

ILLUSTRATIONS.

1. A notice deposited in the Toronto post office for an indorser residing there is as good as if left at his residence: Commercial Bank v. Eccles, 4 U. C. Q. B. 336 (1847).

2. A notice duly posted and addressed to an indorser in "York Township," in which he resided, was held sufficient, there being no evidence that it should have been otherwise addressed: Bank of U. C. v. Bloor, 5 U. C. Q. B. 619 (1849).

3. An indorser's agent gave a wrong address which was written by plaintiff's agent under his signature. A notice sent to the address given held sufficient: Vaughan v. Ross, 8 U. C. Q. B. 506 (1852).

4. Notice mailed between eight and nine in the evening of the day after protest held sufficient, though the post-mark was of the following day: Wilson v. Pringle, 14 U. C. Q. B. 230 (1856).

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Notice by post.

5. A note was presented for payment at G., where the indorser lived, and notice was mailed the following day at M., five miles distant, but not received at G., until the fourth day after dishonor. Held, sufficient: Taylor v. Grier, 17 U. C. Q. B. 222 (1858).

6. When a notary mailed a notice to a wrong address which reached the indorser about a week later, and there was some evidence of the latter having applied to plaintiff for further time, the court refused to disturb a verdict for plaintiff: Leith v. O'Neill, 19 U. C. Q. B. 233 (1860).

7. An indorser died shortly before the maturity of the note The bank which held it not being aware of his death sent the notice of dishonor addressed to him at Toronto, where the note was dated. The firm who had got it discounted took it up and sued his executor. They were aware, before the note matured, both of the death and of the will. Held, reversing 5 Ont. A. R. 458, that the notice was sufficient, and enured to the benefit of plaintiffs: Cosgrave v. Boyle, 6 S. C. Can. 165 (1881).

8. A notary in Montreal protested a note payable there, which was dated at Belleville. Being unable to decipher an indorsement, he put a facsimile of it on an envelope addressing it to Belleville. The holder knew the indorser's name but did not tell the notary. The indorser swore that he did not receive the notice. Held, that he was discharged: Baillie v. Dickson, 7 Ont. A. R. 759 (1882).

9. The address under the indorser's name need not be written by himself. It may be written by another with his knowledge and consent. Sending a notice to such address is sufficient, even if the holder has reason to know that it is not his residence or place of business: Hay v. Burke, 16 Ont. A. R. 463 (1889).

10. A note dated at Montreal payable at Albany, N.Y., was protested there, and a notice addressed to the indorser at Montreal. Held, sufficient as to form, but invalid as it did not appear that the postage was prepaid: Howard v. Sabourin, 5 L. C. R. 45 (1854).

11. A notice which the notary swore was mailed on the evening of the last day for mailing, was held sufficient although it bore the stamp of the following day: Doutre v. La Banque Jacques Cartier, De Bellefeuille C. C. Art. 2319 (1878). See also Stocken v. Collin, 7 M. & W. 515 (1841); New Haven Co. Bank v. Mitchell 15 Conn. 206 (1842).

12. Notice of protest sent to an indorser to a wrong address given by the maker when he got the note discounted, is not sufficient

to bind the indorser: Merchants' Bank v. Cunningham, Q. R. 1 Q. B. 33 (1892). § 49.

13. "Under his signature" in this section does not mean "below his signature," but written so that the signature covers it. Where a wrong address of the indorser was written in pencil under his name, and no proof made as to who wrote it, a notice of protest sent to such address, not being the place where the note was dated, is insufficient. Banque Jacques Cartier v. Gagnon, Q. R. 5 S. C. 499 (1894).

14. Under the Dominion Act of 1874, a notice posted to the address of the indorser the day following dishonor is sufficient, although he lives in the same town, and there is no local delivery: Merchants' Bank v. McNutt, 11 S. C. Can. 126 (1883).

15. A notice to an indorser posted at St. John, addressed "Mr. D. Duff, near Blake's Mills, Nashwaak," is not sufficient without proof that such a letter would probably reach him: Robinson v. Duff, 4 N. B. (2 Kerr) 206 (1843).

16. The holder got the address of an indorser from the payee of the note, with whom he did business, and addressed a notice to him there. It was afterwards learned that he had lately removed. Held, sufficient: Bank of New Brunswick v. Milican, 9 N. B. (4 Allen) 254 (1859).

17. It has been held in England that to address a letter to a person in a large town without any addition to the name of the person or of the town may be invalid. A letter addressed simply "W. Haynes, Bristol," held, not sufficient: Walter v. Haynes, R. & M. 149 (1824).

18. A notice addressed "Mrs. Susan Collins, Boston," held sufficient, there being no proof there was any other of the name. "Mrs. Collins, Boston," would probably have been held insufficient: True v. Collins, 3 Allen, 440 (1862).

19. A drawer or indorser will be presumed not to have changed his address during the currency of the bill: Bank of Utica v. Phillips, 3 Wend. 408 (1829).

Miscarriage in post service.

5. Where a notice of dishonor is duly addressed and posted, as above provided, the sender is deemed to have given due notice of dishonor, notwithstanding any miscarriage by the post office. Imp. Act, s. 49 (15); R. S. C. c. 123, s. 23.

§ 50. If the address on the letter is that on the bill no question will arise. If, however, the holder, knowing that this is not the usual address or residence of the party, undertakes to send a notice to such address or residence he should be certain that he is correct. In such a case it would be prudent to send a notice to the address on the bill as well.

If the receipt of the notice is denied. plaintiff must prove that it was given: Macdougall v. Wordsworth, 8 U. C. C. P. 400 (1858); Merchants' Bank v. Macdougall, 30 U. C. C. P. 236 (1879); Hawkes v. Salter, 4 Bing. 715 (1828). A protest is prima facie evidence of the service of notice of dishonor: section 93, s-s. 5.

By R. S. C. c. 35, s. 43, as soon as any letter is deposited in the post office it ceases to be the property of the sender and becomes the property of the person to whom it is addressed. It is in accordance with principle that the loss should fall on the owner. See Bank of U. C. v. Smith, 3 U. C. Q. B. 358 (1846); Taylor v. Grier, 17 U. C. Q. B. 222 (1858); Shannon v. Hastings M. Ins. Co., 2 Ont. A. R. 81 (1877); Delaporte v. Madden, 17 L. C. J. at p. 32 (1872); Parker v. Gordon, 7 East, 385 (1806); Woodcock v. Houldsworth, 16 M. & W. 124 (1846); Dunlop v. Higgins, 1 H. L. Cas. 380 (1848).

Excuses for non-notice and delay.

50. Delay in giving notice of dishonor is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct or negligence: when the cause of delay ceases to operate the notice must be given with reasonable diligence: Imp. Act, s. 50 (1).

The present sub-section deals with the circumstances which excuse delay in giving notice of dishonor: sub-section 2 with the circumstances which dispense with it entirely. The language used is very similar to that in section 46 regarding the excuses for delay in the presentment for payment; and in

section 51, s-s. 9, regarding excuses for delay in noting or protesting. § 50.

In England and the United States, where no provision exists similar to that in section 49, s-s. 4, recognizing as sufficient a notice posted to any party addressed to the place where the bill is dated, if no other address is given, circumstances would excuse delay, which would not be sufficient in Canada. Notice does not require to be given until after presentment and dishonor. Where delay in presentment is excused, a notice mailed the following day is regular. The only circumstances likely to arise in Canada to cause excusable delay in giving notice, would be the death, sudden illness or some accident to the person making out or posting the notices, or some accident to the messenger charged with taking them to the post office, or the loss of the letters on the way without negligence.

The following circumstances have been held in England and the United States sufficient to excuse delay:—

1. A state of war: see p. 252 ante

2. An epidemic or other calamity, making communication impracticable: Windham Bank v. Norton, 22 Conn., 213 (1852); Tunno v. Lague, 2 Johns, (N.Y.) (1800).

3. Death or sudden illness of the holder or his agent who has the bill: Rothschild v. Currie, 1 Q. B. at p. 47 (1841): White v. Stoddard, 11 Gray (Mass.) 258 (1858).

4. Delay caused by the indorser having given a wrong or illegible address: Hewitt v. Thompson, 1 M. & Rob. 543 (1836); Siggers v. Browne, 1 M. & Rob. 520 (1836): Berridge v. Fitzgerald, L. R. 4 Q. B. 639 (1869).

5. An indorser could not be found when a bill was dishonored. Subsequently his address became known, and some time after a writ was served on him without any previous notice. Held, that he was released on account of not being notified when his address became known: [illegible]ldy v. Beesty, 60 L. T. N. S. 647 (1889): W. N. 1889, p. 14. See Baldwin v. Richardson, 1 B. & C. 245 (1823).

6. A bill drawn in St. John, N.B., was payable in London, Eng., on Saturday, October 16th, and was dishonored. Plaintiffs at Wolverhampton were the holders. A mail left Liverpool on October 19th. Plaintiffs sent notice to the drawer by the next

§ 50. mail, which left on November 4th. Held that the delay was excused: Tarratt v. Wilmot, 6 N. B. (1 Allen) 353 (1849).

The delay was held inexcusable in the following case: A bill was protested in Dublin, Ireland, on November 3rd. Mails for St. John, N. B., where the drawer and indorsers lived, left November 4th and 19th. Notices were sent only by the following mail, which arrived December 22nd. Held, that the drawer and indorsers were discharged: Bank of New Brunswick v. Knowles, 4 N. B. (2 Kerr) 219 (1843).

Notice dispensed with.

2. Notice of dishonor is dispensed with—

If impracticable.

(*a*) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged: Imp. Act, s. 50, (2) (*a*).

If a notice is sent otherwise than by post, and does not reach the party, from some cause for which the sender is not responsible, and the latter is not aware of the fact that the notice was not received, it will be dispensed with. If the sender becomes aware of the fact, or if the notice sent by post is to a wrong address, he should send a proper notice at once: Steinhoff v. Merchants' Bank, 46 U. C. Q. B. 25 (1881).

It has been held in England that ignorance of the place of residence of a drawer or indorser dispenses with notice if due diligence is used to discover it: Browning v. Kinnear, Gow, 81 (1819). See Bateman v. Joseph, 12 East, 433 (1810); Beveridge v. Burgis, 3 Camp. 262 (1812); Williams v. Germaine, 7 B. & C. 469 (1827). But in Canada notice may be mailed to the place where the bill is dated: section 49, s-s. 4.

Notice of dishonor is not dispensed with because presentment is dispensed with, or because the drawer or indorser has reason to believe the bill will not be paid, or because the acceptor is dead and no representative can be found: Carew v. Duckworth, L. R. 4 Ex. at p. 319 (1869); Caunt v. Thompson, 7 C. B. 400 (1849); or because the drawer or indorser is dead: section 49 (*i*).

(*b*) By waiver express or implied: notice of dishonor may be waived before the time of giving notice has arrived, or after the omission to give due notice: Imp. Act, s. 50 (2) (*b*). § 50. Notice waived.

The waiver may be on the bill itself: section 16 (*b*). See ante p. 91. Where an acknowledgment of liability is relied upon to establish a waiver it must be made with full knowledge of the facts: Goodall v. Dolley, 1 T. R. 712 (1787); McFatridge v. Williston, 25 N. S. 11 (1892).

ILLUSTRATIONS.

1. An indorser asked for time and promised to pay. Held, to be a waiver of notice: Bank of Upper Canada v. Cooley, 4 U. C. O. S. 17 (1834). Where an indorser writes the holder that the maker of a note is insolvent to make him believe that presentment and notice are unnecessary, it is a waiver of notice: Beckett v. Cornish, 4 U. C. Q. B. 138 (1847).

2. A promise to pay with knowledge of the facts is a waiver of notice: Bank of B. N. A. v. Ross, 1 U. C. Q. B. 199 (1843); Brown v. Marsh, 1 U. C. C. P. 438 (1852); Gillespie v. Marsh, ibid. 453 (1852); Burke v. Elliott, 15 U. C. Q. B. 610 (1857); Shaw v. Salmon, 19 U. C. Q. B. 512 (1860); Ross v. Wilson, 2 Rev. de Leg. 28 (1812); McLaurin v. Seguin, Q. R. 12 S. C. 63 (1897); Mills v. Gibson, 16 L. J. C. P. 249 (1847); Woods v. Dean, 3 B. & S. 101 (1862); Cordery v. Colville, 32 L. J. C. P. 210 (1863); Bartholomew v. Hill, 5 L. T. N. S. 756 (1862); Kilby v. Rochussen, 18 C. B. N. S. 357 (1865); promise not sufficiently definite or well proved to amount to a waiver: Bank of Montreal v. Scott, 24 U. C. Q. B. 115 (1864); Reed v. Mercer, 16 U. C. C. P. 279 (1866).

3. A statement by the indorser of a dishonored note to the holder that he would see the maker about it, and his subsequent statement that he had seen the maker, who promised to pay it as soon as he could, with a request not to "crowd the note," are not in themselves sufficient evidence of waiver of notice of dishonor: Britton v. Milsom, 19 Ont. A. R. 96 (1892).

4. An indorser wrote above his signature on the back of a note: "I hold myself liable for my note." This was a waiver of notice of dishonor: Ranger v. Aumais, 5 Que. P. R. 450 (1903).

5. Waiver of protest by a curator in Quebec does not bind the insolvent: Denenberg v. Mendelssohn, Q. R. 23 S. C. 128 (1903);

§ 50. Molsons Bank v. Steel, ibid. 316 (1903). In re Boutin, Q. R. 12 S. C. 186 (1897) overruled.

6. Waiver of notice to the holder enures to the benefit of prior parties, as well as to subsequent holders: Rabey v. Gilbert, 30 L. J. Ex. 170 (1861).

7. Waiver of notice enures to the benefit of the holder of a bill, and of all the indorsers subsequent to the party to whom the waiver is made: Coulcher v. Toppin, 2 T. L. R. 657 (1886).

8. The fact that a party to a note is aware that it will not be paid on presentment, does not dispense with the necessity of giving him notice of dishonor: Greig v. Taylor, 15 V. L. R. 86 (1889).

9. The indorser of a note told the holder before maturity that he knew it would not be paid, and promised to send money to the bank where it was payable. Held, evidence for the jury of dispensation of notice of dishonor by waiver: Wright v. Barrett, 13 N. S. W. R. (Law) 206 (1892).

10. An indorser of a note, not yet due, being informed of the bankruptcy of the maker, said to the payee and holder: "I will have to provide for the note." This is not, as a matter of law, a waiver of notice of dishonor. The question should be left to the jury: Wiggins v. Bellve, 15 N. Z. 540 (1897).

When drawer not entitled to notice.

(*c*) As regards the drawer, in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment: Imp. Act, s. 50 (2) (*c*).

Drawer principal debtor.

In these cases the drawer is in reality the principal debtor, and except in the last the bill is not what on its face it purports to be. He is, therefore, on the principles of the law merchant not entitled to notice, which is accorded only to the

person who in effect only promises to pay if the person primarily liable does not honor the bill on due presentment, and if notice of such dishonor is duly given him. § 50.

Where drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may, if he choose, treat the instrument as a promissory note: section 5, s-s. 2. The drawer would then be in the position of maker of the note, and so not entitled to notice of its dishonor. See p. 51, ante. In the other instances notice is equally unnecessary.

ILLUSTRATIONS.

1. Where the drawer had no funds in the hands of the acceptor and made no provision for the payment of the bill, he is liable without protest or notice of dishonor: Knapp v. Bank of Montreal, 2 L. C. R. 252 (1850); Bickerdike v. Bollman, 1 T. R. 405 (1786); Dickens v. Beal, 10 Pet. (U. S.) 572 (1836).

2. A drawer who had no effects in the hands of the drawees, or any reasonable ground for expecting he would have or that the bill would be honored, may be sued without previous notice of dishonor: Stayner v. Howatt, 15 N. S. (3 R. & G.) 267 (1882).

3. A bill drawn payable at the drawer's is presumably an accommodation bill, and he is not entitled to notice: Sharp v. Bailey, 9 B. & C. 44 (1829).

4. Presentment of the bill to the drawer, as the executor of the acceptor, renders notice to him unnecessary: Caunt v. Thompson, 7 C. B. 400 (1849).

(*d*) As regards the indorser, in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation. Imp. Act, s. 50 (2) (*d*). When indorser not entitled to notice.

Notice need not be given to the indorser in these cases, because in (1) he has no reasonable ground for believing that

§ 50. the bill will be honored: in (2) he is aware it is not paid: and (3) he is the person who ought to pay it.

Notice of dishonor is not dispensed with when a note becomes exigible in the Province of Quebec before the date of maturity under Art. 1092 C. C., on account of the insolvency of the maker and indorser: Banque Nationale v. Martel, Q. R. 17 S. C. 97 (1899).

An indorser is entitled to notice of dishonor whether the drawee has funds in his hands or not: Griffin v. Phillips, 2 Rev. de Leg. 30 (1821); Knapp v. Bank of Montreal, 1 L. C. R. 252 (1850).

Notice to Others than Drawer and Indorsers.

The Act provides only for notice to the drawer and indorsers of a bill. The acceptor of a bill and maker of a note are liable without notice: section 52, s-s. 3; section 88, s-s. 2.

The liability of persons who are not parties to a bill, but who may be guarantors of the bill or of some of the parties to it, or who may be liable on the consideration for which the bill is given, is not affected by the Act, but will remain subject to the laws in force in the several provinces.

A person who has given a guarantee for the payment of a bill is liable without notice of dishonor: Palmer v. Baker, 22 U. C. C. P. 59 (1871); Warrington v. Furbor, 8 East, 242 (1807); Murray v. King, 5 B. & Ald. 165 (1821); Van Wart v. Woolley, 3 B. & C. 439 (1824); Walton v. Mascall, 13 M. & W. 72 (1844).

It has also been laid down that the person who gives a guarantee for the price of goods to be supplied to the acceptor of a bill or the maker of a note is not entitled to notice of dishonor: Anderson v. Archibald, 9 N. S. (3 G. & O.) 88 (1872); Holbrow v. Wilkins, 1 B. & C. 10 (1822); while if the goods are for the drawer of the bill he is entitled to notice: Philips v. Astling, 2 Taunt. 206 (1809). See also Swinyard v. Bowes, 5 M. & S. 62 (1816); Camidge v. Allenby, 6 B. & C. 373 (1827); Smith v. Mercer, L. R. 3 Ex. 51 (1867); Carter v. White, 25 Ch. D. 666 (1883).

As to those who have placed their names on bills in Quebec "pour aval" or as warrantors elsewhere, see the notes on section 56. s. 51.

51. Where an inland bill has been dishonored it may, if the holder thinks fit, be noted and protested for non-acceptance or non-payment, as the case may be; but, subject to the provisions of this Act with respect to notice of dishonor, it shall not, except in the Province of Quebec, be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser; but in the case of a bill drawn upon any person in the Province of Quebec, or payable or accepted at any place therein, in default of protest for non-acceptance or non-payment, as the case may be, and of notice thereof, the parties liable on the bill other than the acceptor are discharged, subject, nevertheless, to the exceptions in this section hereinafter contained: Imp. Act, s. 51 (1); C. C. 2298, 2319.

Noting or protest of inland bill

Section 51 of the Imperial Act reads as follows:—"Where an inland bill has been dishonored it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser." It will be seen that the Canadian Act, for the Provinces other than Quebec, is substantially the same as the Imperial Act. The words "subject to the provisions of this Act with respect to notice of dishonor" were added in the Senate, to make it clear that while inland bills need not be noted or protested, there was no intention to relieve from the duty of giving notice of dishonor, as laid down in sections 48 and 49, when the drawer or indorsers were to be held liable.

Sec. 51 of Imperial Act

§ 51.

All bills must be protested in Quebec.

By the latter part of the clause, Quebec retains its old law as embodied in Articles 2298 and 2319 of the Civil Code, which required a notarial protest with notice to the drawer and indorsers of an inland as well as a foreign bill. In the other provinces the holder of an inland bill may either protest it, or merely send notices of dishonor in accordance with section 49. As a protest makes prima facie proof not only of presentation and dishonor, but also of the service of the notices, section 93, s-s. 5, the practice of protesting in these other provinces has, as a rule, been adopted. If a bill sent for acceptance or collection is not to be protested in case of dishonor, special instructions should be given by attaching a memorandum of "no protest," or otherwise.

Optional elsewhere.

The protesting of inland bills for non-acceptance or for better security, elsewhere than in Quebec, is only compulsory as a preliminary to an acceptance supra protest for honor: section 64; and a protest for non-payment, only as a preliminary to presentment for payment to the acceptor for honor, or referee in case of need: section 66.

Conflict of laws.

In case of conflict, the laws governing presentment for acceptance or payment, and the necessity for or sufficiency of a protest, are those of the place where the act is done or the bill is dishonored: section 71, s-s. 2 (*c*). This principle is recognized in the second clause of the above sub-section, which lays down the rule of the provinces other than Quebec: but, according to the last clause, every inland bill drawn upon any person in Quebec, or accepted at any place in that province, must be protested in order to hold the drawer and indorsers, even if it be drawn and made payable in another province. According to the recognized rules of interpretation, this last clause being exceptional and explicit would govern, although it is certain that Parliament did not contemplate any such departure from the general rule.

Where a bill or note is payable in Lower Canada the law of that province was held to govern as to the sufficiency of notice of dishonor, although the indorser resided in Upper Canada, and made the indorsement there: City Bank v. Ley,

1 U. C. Q. B. 192 (1843); Smith v. Hall, 3 U. C. Q. B. 315 (1847). § 51.

The form for the noting of a bill for non-acceptance is given as Form A in the first schedule to the Act.

The protest of a bill need not be made out at the time, it is sufficient for the notary to make the necessary noting on the bill, and to extend it later, as of the day of the noting: section 92. Noting protest.

When a bill is not paid on the day it falls due, but is expected to be on the following day, it is sometimes simply noted on the day of maturity. If it is not paid the next day as expected, the protest is extended and the notices of dishonor sent.

The present section applies to promissory notes as well as to bills and cheques, with the modifications mentioned in section 88.

2. Where a foreign bill, appearing on the face of it to be such, has been dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonored by non-acceptance, is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonor, except as in this section provided, is unnecessary: Imp. Act, s. 51 (2). Protest of foreign bill.

The words "except as in this section provided" are not in the Imperial Act, but were inserted to meet the exceptional provisions for the Province of Quebec in the preceding sub-section. As to what is a foreign bill, see section 4. Foreign notes as well as bills should be protested in order to bind the indorsers: section 88, s-s. 4.

§ 51.

Chalmers says (p. 2) that this sub-section alters the law in England. He probably refers to the last clause which agrees with section 4, s-s. 2. The first clause is part of the law merchant: Rogers v. Stephens, 2 T. R. 713 (1788); Gale v. Walsh. 5 T. R. 239 (1793); Orr v. Maginnis, 7 East, 359 (1806).

Subsequent protest.

3. A bill which has been protested for non-acceptance, or a bill of which protest for non-acceptance has been waived, may be subsequently protested for non-payment: Imp. Act, s. 51 (3).

The above provision regarding a waiver of protest for non-acceptance is not in the Imperial Act. The holder may upon dishonor by non-acceptance either proceed at once against the drawer and indorsers: section 43, s-s. 2; or he may hold the bill until its maturity and present it for payment.

Time for noting.

4. Subject to the provisions of this Act, when a bill is protested the protest must be made or noted on the day of its dishonor. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting; Imp. Act, s. 51 (4).

The Imperial Act reads, "When a bill is noted or protested it must be noted on the day of its dishonor." The circumstances which excuse delay in protesting or noting, or dispense with protest, are to be found in sub-section 6 (a), and sub-section 9. See section 92 for similar provisions. If the bill has been duly noted, the protest may be completed even during the trial. Orr v. Maginnis, 7 East, at p. 361 (1806).

The rule requiring the noting or protest to be on the day of the dishonor is new.

5. Where the acceptor of a bill suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers: Imp. Act, s. 51 (5); 54-55 V. c. 17, s. 7 (Can.) § 51.

If acceptor suspends payment.

The Imperial Act reads, "Where the acceptor of a bill becomes bankrupt or insolvent, or suspends payment, etc." In the Act of 1890, the words "or insolvent" were omitted, but "becomes bankrupt or" remained. These were struck out by the amending Act of 1891, as there is no general bankrupt law for Canada.

Rule on the continent.

Chalmers says (p. 176):—"Under some of the Continental codes, when the acceptor fails during the currency of a bill, security can be demanded from the drawer and indorsers. English law provides no such remedy, and the only effect of such a protest in England is, that the bill may be accepted for honor."

Rule in Quebec.

In Quebec the Civil Code provides, Art. 1092, that "the debtor cannot claim the benefit of the term when he has become bankrupt or insolvent," and bankruptcy is defined as "the condition of a trader who has discontinued his payments:" Art. 17 (23). It has been held, that on the bankruptcy of the maker, a promissory note which had two years to run became immediately exigible: Lovell v. Meikle, 2 L. C. J. 69 (1853).

When both maker and indorser become insolvent the holder may proceed against both, but before proceeding against the indorser he should protest the note: Banque Nationale v. Martel, Q. R. 17 S. C. 97 (1899).

In France, when the acceptor fails, the bill may at once be treated as dishonored and protested for non-payment: Code de Com. Art. 163; Nouguier, § 1277.

Where bill must be protested.

6. A bill must be protested at the place where it is dishonored, or at some other place in Canada situate within five miles of the place of presentment and dishonor of such bill: Imp. Act, s. 51 (6).

§ 51. The Imperial Act simply reads, "A bill must be protested at the place where it is dishonored." The other words were added in the House of Commons on the suggestion of the Minister of Justice, in order, as he said, to "facilitate the making of protests, and prevent hardship likely to occur in country districts." See Mitchell v. Baring, 4 C. & P. 35 (1829), and section 93.

If presented through the post.

Provided that—

(*a*) When a bill is presented through the post office, and returned by post dishonored, it may be protested at the place to which it is returned, not later than on the day of its return or the next juridical day: Imp. Act, s. 51 (6) (*a*).

A bill may be presented for payment through the post office where by agreement or usage this is sufficient: section 45, s-s. 6. The Imperial Act requires the protest to be on the day of the return, if the bill arrives during business hours.

Every day is a juridical day except the legal holidays mentioned in section 14, s-s. 2.

Protest on day of dishonor.

(*b*) Every protest for dishonor, either for non-acceptance or non-payment, may be made on the day of such dishonor at any time after non-acceptance, or in case of non-payment, at any time after three o'clock in the afternoon: R. S. C. c. 123, s. 22.

This clause in the Revised Statutes of Canada, cited above, applied to Ontario alone, having been taken from the Consolidated Statutes of Upper Canada, chapter 42. In Quebec a bill could be protested for non-payment in the afternoon of the last day of grace: C. C. 2319.

A bill may apparently be presented for payment at any reasonable hour of the day it falls due, or if payable on demand, at any reasonable time on any day on which the holder

may choose to present it: section 45; but it cannot be protested before 3 o'clock, even on Saturday. It was proposed in the Commons to make the hour one o'clock on Saturday, but the suggestion was not adopted. This provision as to the hour is general, and apparently will apply to bills payable on demand as well as to those payable on a fixed day. The protest does not require to state that it was made after three o'clock: Forms E. and F.

§ 51. Day and hour of protest.

In England, Canada, and most of the United States, bills, as a rule, are not presented by the notary in person, but by his clerk. Where such a usage prevails it will be recognized. So held in Ontario by Galt, C.J., in Boas v. McCartney, Feb. 18th, 1889; affirmed by Queen's Bench Divisional Court, May 23rd, 1889 (not reported). For notarial forms of protest, see First Schedule to the Act, Forms B, C, D, E, and F.

7. A protest must contain a copy of the bill, or the original bill may be annexed thereto, and the protest must be signed by the notary making it, and must specify—

What protest shall set forth.

(*a*) The person at whose request the bill is protested:

(*b*) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found: Imp. Act, s. 51 (7) (*a*) (*b*).

The words "or the original bill may be annexed thereto," are not in the Imperial Act; but this mode of protesting was that followed in Ontario before the Act: R. S. C. c. 123, s. 24, and Schedule A. In Quebec, the bill and indorsements were copied in the protest, which was made in duplicate, the notary retaining one in his office and delivering the other

§ 51. with the bill to the person at whose request the protest was made: Con. Stat. L. C. c. 64, ss. 11, 12; R. S. C. c. 123, s. 29, and Schedule B.

Before the Act of 1882, protests in England were usually made under the seal of the notary: Brooks' Notary, 4th ed., p. 82. The clause requiring a seal was struck out in Committee: Chalmers, p. 178.

In the case of foreign bills at least it is well for a notary to use his seal, as in some countries a protest will not be received in evidence without an official seal.

ILLUSTRATIONS.

1. Before the Act a seal was not required on the protest in Ontario or Quebec: Goldie v. Maxwell, 1 U. C. Q. B. 424 (1841): Russell v. Crofton, 1 U. C. C. P. 428 (1852); R. S. C. c. 123, Schedules A and B; but was in Nova Scotia: Merchants' Bank v. Spinney, 13 N. S. (1 R. & G.) 87 (1879).

2. Before the Act of 1851, a protest in Lower Canada that did not state that it was made in the afternoon of the day it bore date was invalid: Joseph v. Delisle, 1 L. C. R. 244 (1851).

3. When the protest is made for a qualified acceptance, it must not state a general refusal to accept, otherwise the holder cannot avail himself of the qualified acceptance: Bentinck v. Dorrien, 6 East, 199 (1805); Sproat v. Matthews, 1 T. R. 182 (1786).

If bill is lost, etc.

8. Where a bill is lost or destroyed, or is wrongly or accidentally detained from the person entitled to hold it, or is accidentally retained in a place other than where payable, protest may be made on a copy or written particulars thereof: Imp. Act, s. 51 (8).

The provision here made for protest in case of the accidental detention or retention of a bill is not in the Imperial Act. The necessary particulars can usually be obtained from the bill book.

The right to make a protest on a copy of a lost note has long been recognized: Dehers v. Harriot, 1 Shower, 163 (1690).

§ 52.

9. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence. Imp. Act, s. 51 (9). Excuses for non-protest and delay

The circumstances which dispense with notice of dishonor are set out in section 50, s-s. 2.

The circumstances which excuse delay in noting and protesting, as set out in this sub-section, are identical with those which excuse delay in making presentment for payment, as set out in section 46.

See the notes and cases cited under these sections; also Legge v. Thorpe, 12 East, 171 (1810); Gibbon v. Coggon, 2 Camp. 188 (1809); Greenway v. Hindley, 4 Camp. 52 (1814); Patterson v. Becher, 6 Moore, 319 (1821); Campbell v. Webster, 2 C. B. 258 (1845); Ex parte Lowenthal, L. R. 9 Ch. 591 (1874).

10. No clerk, teller or agent of any bank shall act as a notary in the protesting of any bill or note payable at the bank or at any of the branches of the bank in which he is employed. R. S. C. c. 123, s. 11. No bank officer to protest.

This provision is not in the Imperial Act. It was first enacted for Upper and Lower Canada in 1850, and made applicable to the whole Dominion by the Revised Statutes of Canada.

52. When no place of payment is specified in the bill or acceptance, presentment for payment is not necessary in order to render the acceptor liable: Imp. Act, s. 52 (1). Liability of acceptor as to presentment.

§ 52.

The Imperial Act reads, "when a bill is accepted generally, presentment is not necessary in order to render the acceptor liable." The change was made in this section to correspond with that made in section 19, which provides that an acceptance to pay at a particular specified place is not a qualified acceptance. The same rule applies to the maker of a promissory note: section 86, s-s. 1. See Wilson v. Brown, 6 Ont. A. R. 87 (1881); Shuter v. Paxton, 5 L. C. J. 55 (1860); Archer v. Lortie, 3 Q. L. R. 159 (1877); Mineault v. Lajoie, 9 R. L. 382 (1877); Rowe v. Young, 2 Bligh H. L. at pp. 467, 468 (1820); Maltby v. Murrells, 5 H. & N. at p. 823 (1860). Also notes and illustrations under section 86, s-s. 1.

Where payment to be made.

The reason given by Chalmers for the rule in this section is that "at common law the debtor is bound to seek out his creditor to pay him": Coke on Littleton, s. 340; Cranley v. Hillary, 2 M. & S. 120 (1813). The general rule in Quebec is, that if no place is indicated in the contract, payment should be made at the domicile of the debtor: C. C. Art. 1152. By Art. 1069 of the Civil Code it is provided that in all contracts of a commercial nature in which the time of performance is fixed, the debtor is put in default by the mere lapse of time, and this would apply to bills and notes not payable on demand, and would provide for interest from their maturity; so that it becomes a mere question of costs, if the debtor when sued pays the money into court.

A presentment and notice of dishonor unless dispensed with are necessary to render the drawer and indorsers liable: sections 45, 46, 48 and 49.

No presentment at place specified.

2. When a place of payment is specified in the bill or acceptance, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures, but if any suit or action be instituted thereon before pre-

sentation the costs thereof shall be in the discretion of the court: § 52

Section 52 (2) of the Imperial Act reads: "When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures."

Reason for change.

The change in the first part of the sub-section was made in the Senate to correspond with the change made in section 19 as to an acceptance at a particular specified place; and in the latter part to meet the case of an acceptor providing funds at the proper place and the holder suing without applying there. Section 86 has a similar provision as to promissory notes.

See McIver v. McFarlane, Taylor, U. C. 113 (1824); Macaulay v. McFarlane, Rob. & Jos. Dig. 493 (1840); Rice v. Bowker, 3 L. C. R. 305 (1853); Mount v. Dunn, 4 L. C. R. 348 (1854); O'Brien v. Stevenson, 15 L. C. R. 265 (1865), Crepeau v. Moore, 8 Q. L. R. 197 (1882); Chandler v. Beckwith, 2 N. B. (Berton) 423 (1838); Ratchford v. Griffith, 4 N. B. (2 Kerr) 112 (1843); Biggs v. Wood, 2 Man. 272 (1885).

It would seem as if the words "express stipulation" in the clause as it now stands, would mean an express stipulation that the acceptor should be discharged if the bill were not presented on the day of maturity.

"Express stipulation."

Chalmers (p. 180) applies these words in the Imperial Act to the case where a bill by the acceptance is made payable at a particular place only, and suggests that when a bill is made payable at a particular place, and there only, the position of the acceptor is for many purposes analogous to that of the drawer of a cheque, and that if he could show that he was damnified by the holder's omission to present it on the proper day, he would probably be discharged. He refers to Bishop v. Chitty, 2 Stra. 1195 (1742); Alexander v. Burchfield, 7 M. & Gr. 1061 (1842); Halstead v. Skelton,

§ 52. 5 Q. B. at pp. 93, 94 (1843); Mullick v. Radakissen, 9 Moore P. C. at p. 70 (1854); and Smith v. Vertue, 30 L. J. C. P. at pp. 59, 60 (1860).

It will be observed that this clause in the Canadian Act is wider in its scope than the corresponding one in the Imperial Act. The latter applies only to a qualified acceptance making a bill payable at a particular place, and there only; the former to all cases where either the bill itself or the acceptance names a place of payment.

No protest or notice necessary.

3. In order to render the acceptor of a bill liable, it is not necessary to protest it, or that notice of dishonor should be given to him: Imp. Act, s. 52 (3).

Protest or notice to the acceptor of a bill is unnecessary even if it be a foreign bill. The maker of a note is in the same position: section 88, s-s. 4. The reason is that they are the persons primarily liable: Treacher v. Hinton, 4 B. & Ald. 413 (1821); Smith v. Thatcher, ibid. 200 (1821). See also cases under sub-section 1, ante, p. 292.

Presentment for payment.

4. Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it. Imp. Act, s. 52 (4).

Presentment for payment is made by the holder or by some person authorized to receive payment on his behalf: section 45, s-s. 2 (*c*). For a definition of holder see ante, p. 24; and as to payment, section 59. See section 69 as to a lost bill.

Bill should be exhibited.

The bill should be produced and exhibited, as the person paying has a right to it as a voucher in his account with other parties: De la Chevrotiere v. Guilmet, 9 L. N. 412 (1886); Jordan v. Coates, 7 N. B. (2 Allen) 107 (1850), Hansard v. Robinson, 7 B. & C. at p. 94 (1827); Ramuz v

Crowe, 1 Ex. at p. 174 (1847); Crowe v. Clay, 9 Ex. 604 (1854); Musson v. Lake, 4 How. (U. S.) 262 (1846). § 53.

If a bill is payable at a bank or other particular place, and is lying there on the day of maturity, no special form of presentment is necessary: Harris v. Perry, 8 U. C. C. P. at p. 409 (1858); Pullen v. Sanford, 16 N. S. (4 R. & G.) 242 (1883); Souther v. Wallace, 20 N. S. 509 (1888); Biggs v. Wood, 2 Man. 272 (1885); Bailey v. Porter, 14 M. & W. 44 (1845).

If on demand of payment the bill is not asked for and payment is refused on some other ground, or inability to pay is acknowledged, exhibition of the bill is waived: Chandler v. Beckwith, 2 N. B. (Berton) 423 (1838); Gilbert v. Dennis, 3 Metc. 495 (1842); Lockwood v. Crawford, 18 Conn 361 (1847).

LIABILITIES OF PARTIES.

Sections 53 to 58, inclusive, treat of the liability of the several parties to a bill—the drawee, the acceptor, the drawer, the indorser—also of a stranger who puts his name upon it, and of a transferrer by delivery. The measure of damages against those who are parties to a dishonored bill is also declared in section 57.

53. A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument. Imp. Act, s. 53 (1). Funds in hands of drawee.

Section 53 of the Imperial Act, from which the foregoing is taken, provides that it shall not apply to Scotland, and the following sub-section is added:—"(2) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favor of the holder from

§ 53. the time when the bill is presented to the drawee." The law of France is similar to that of Scotland: Nouguier, §§ 392, 431.

Cheque and equitable assignment.

An order to pay out of a particular fund is not a bill of exchange: section 3, s-s. 3. It was formerly considered in England that a cheque was in the nature of an equitable assignment of funds in the hands of the banker: Keene v. Beard, 8 C. B. N. S. at p. 381 (1860). But it was well settled before the Act of 1882, that a cheque was not an equitable assignment, but a bill of exchange drawn upon a banker, that there was no privity between the banker and the holder of the cheque, and the latter had no action, even if there were funds: Hopkinson v. Forster, L. R. 19 Eq. 74 (1874); Schroeder v. Central Bank, 34 L. T. N. S. 735 (1876). It was also held in Ontario that an unaccepted cheque was not an equitable assignment, and the holder had no action against the bank: Caldwell v. Merchants' Bank, 26 U. C. C. P. 294 (1876). In Quebec, however, it was held that a cheque was a transfer of so much of the funds of the drawer in the bank and gave the holder a right of action: Marler v. Molsons Bank, 23 L. C. J. 293 (1879). The general rule in the United States is similar to that of England, and an action cannot be maintained against a bank by the holder of an unaccepted cheque: Fourth Street Bank v. Yardley, 165 U. S. 634 (1897). In several of the States, however, the holder is allowed to sue on an unaccepted cheque;—in Louisiana: Gordon v. Mulcher, 34 La. Ann. 608 (1882);—in Illinois: Union Nat. Bank v. Oceana Co. Bank, 80 Ill. 212 (1875); Springfield Ins. Co. v. Peck, 102 Ill. 265 (1882); in Missouri: Senter v. Continental Bank, 7 Mo. App. 532 (1879);—in Kentucky; Lester v. Given, 8 Bush (Ky.), 358 (1871);— and in South Carolina: Fogarties v. State Bank, 12 Richardson, 518 (1860); Simmons Hardware Co. v. Bank, 41 S. C. 177 (1893). In those States which have adopted the Negotiable Instruments Law, the English rule applies, as section 321 defines a cheque as a bill of exchange drawn on a bank, payable on demand; and

section 325 provides that it shall not operate as an assignment of the funds of the drawer in the bank, and that the bank shall not be liable to the holder, unless or until it accepts or certifies the cheque. § 53.

Since the coming into force of the present Act the English and Ontario rule prevails throughout Canada, as section 72 of the Act provides that "a cheque is a bill of exchange drawn on a bank," and the present section applies to cheques as well as to other bills: Re Commercial Bank [illegible] Man. 171 (1894).

The rule laid down in the section has long been recognized in England as to ordinary bills: Griffin v. Weatherby, L. R. 3 Q. B. 753 (1868); Shand v. Du Buisson, L. R. 18 Eq. 283 (1874); even in case of a bill accepted payable at a banker's: Yates v. Bell, 3 B. & Ald. 643 (1820); Moore v. Bushell, 27 L. J. Ex. 3 (1857); Hill v. Royds, L. R. 8 Eq. 290 (1869). Also in Ontario: Lamb v. Sutherland, 37 U. C. Q. B. 143 (1875); and in the United States: Carr v. Nat. Bank, 107 Mass. 45 (1871); Bank of Commerce v. Bogy, 44 Mo. 15 (1869); First Nat. Bank v. Dubuque, 52 Iowa, 378 (1879). Bill not [illegible] assignment.

A letter of credit is similar in this respect to a bill of exchange: Morgan v. Larivière, L. R. 7 H. L. 432 (1875); British Linen Co. v. Caledonia Ins. Co., 4 Macq. H. L. 109 n. (1861); Union Bank v. Cole, 47 L. J. C. P. 109 (1878). Where, however, an open letter of credit contained a provision that parties negotiating bills under it were requested to indorse particulars on the back of it, and the payee of a bill drawn under it had the particulars duly indorsed, he was allowed to rank on the insolvent estate of the bank issuing the letter: Re Agra Bank, L. R. 2 Ch. 391 (1867). See also Ex parte Stephens, L. R. 3 Ch. 756 (1868); Citizens' Bank v. New Orleans Bank, L. R. 6 H. L. 352 (1873). Letter of credit.

It will be observed that the section says that a bill does not "of itself" operate as an assignment of funds in the hands of the drawee. This, however, may be effected by an

§ 54. agreement outside of the bill: Robey v. Ollier, L. R. 7 Ch. 695 (1872); Ranken v. Alfaro, L. R. 5 Ch. D. 786 (1877).

Liability of acceptor.

54. The acceptor of a bill, by accepting it—

(*a*) Engages that he will pay it according to the tenor of his acceptance; Imp. Act, s. 54 (1).

See section 17 as to the form of a valid acceptance.

An acceptance may be either general or qualified: section 19. In the former case the undertaking of the acceptor is that he will pay the bill according to its terms; in the latter that he will pay it as modified by the terms of his qualified acceptance. By his acceptance he becomes the primary debtor, the drawer and indorsers being only secondarily or conditionally liable: Rowe v. Young, 2 Bligh H. L. 467 (1820); Philpot v. Briant, 4 Bing. 720 (1828); Jones v. Broadhurst, 9 C. B. 181 (1850); Smith v. Vertue, 9 C. B. N. S. 214 (1860); Cox v. National Bank, 100 U. S. (10 Otto) 712 (1879); C. C. Art. 2294.

The position of the drawer and indorsers after dishonor of a bill is analogous in several respects to that of a surety: Cook v. Lister, 13 C. B. N. S. 543 (1863); Rouquette v. Overmann, L. R. 10 Q. B. 536 (1875); Duncan v North & S. W. Bank, 6 App. Cas. 19 (1880).

See Harmer v. Steele, 4 Ex. Ch. 13 (1849), on the relation of several joint acceptors who are not partners.

Drawees who have promised to accept, or who have knowingly accepted the benefit of funds obtained on a representation that they would accept, have been held liable. Torrance v. Bank of British North America, 15 L. C. J. 169, 17 L. C. J. 185; L. R. 5 P. C. 246 (1873); Molsons Bank v. Seymour, 21 L. C. J. 82; in appeal, Dunspaugh v. Molsons Bank, 23 L. C. J. 57 (1878); Bank of Montreal v. Thomas, 16 O. R. 503 (1888).

See section 26 as to an acceptor signing as an agent or in a representative character.

(*b*) Is precluded from denying to a holder in due course— § 54.

Estoppel of acceptor.

(1) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill; Imp. Act, s. 54 (2) (*a*).

As to forged signature.

Section 24 provides that, "subject to the provisions of the Act," a forged or unauthorized signature is wholly inoperative. The present is one of the provisions which modify that section. This has long been recognized as law: Jones v. Goudie, 2 Rev. de Leg. 334 (1820); McKenzie v. Fraser, ibid. 30 (1825); Ryan v. Bank of Montreal, 12 O. R. 39 (1886); 14 Ont. A. R. 533 (1887); Jenys v. Fawler, 2 Str. 946 (1732); Cooper v. Meyer, 10 B. & C. 468 (1830); Sanderson v. Collman, 4 M. & Gr. 209 (1842); Vagliano v. Bank of England, [1891] A. C. 107; Hoffman v. Bank of Milwaukee, 12 Wall. (U. S.) 193 (1870); Bank of U. S. v. Bank of Georgia, 10 Wheat. (U.S.) 333 (1825).

As to altered bill.

If the bill be materially altered the acceptor is not precluded from setting this up: Burchfield v. Moore, 3 E. & B. 683 (1854); Young v. Grote, 4 Bing. 253 (1827); Marine Nat. Bank v. National City Bank, 59 N. Y. 67 (1874). But where a bank issued a draft for $25 on one of its branches without advice, and the holder raised it to $5,000 and deposited it in another bank which drew the money, and the forgery was discovered six days later, it was held that the bank which had paid could not recover back: Union Bank v. Ontario Bank, 3 L. N. 386; 24 L. C. J. 309 (1880).

Estoppel of acceptor as to capacity of drawer

(2) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement; Imp. Act, s. 54 (2) (*b*).

The first part of this sub-section follows from the preceding one, for if the drawer has capacity to draw a bill, he has also capacity to indorse. When he has accepted such a

§ 54. bill, the acceptor is precluded from setting up that the drawer was an infant, an insane person, a married woman (where this is a disability), or a corporation without power to contract by bill: Taylor v. Croker, 4 Esp. 187 (1803) (infant); Smith v. Marsack, 6 C. B. 486 (1848) (married woman); Stoutimore v. Clark, 70 Mo. 477 (1879) (corporation).

Where a bill is drawn by an agent he might have authority to draw but not to indorse. For illustrations of this, see Robinson v. Yarrow, 7 Taunt. 455 (1817); Garland v. Jacomb, L. R. 8 Ex. 216 (1873).

If bill indorsed before acceptance.

It was for some time a disputed point whether an acceptance admitted the genuineness and validity of the indorsement if the bill was indorsed before acceptance: Robarts v. Tucker, 16 Q. B. at p. 576 (1851); Aspitel v. Bryan, 3 B. & S. 489 (1864). Before the Act it was, however, settled in Ontario that this did not preclude the acceptor: Ryan v. Bank of Montreal, 14 Ont. A. R. 533 (1887). Before the Act of 1882 it was held in England that when a bill is accepted in blank for the purpose of being negotiated, and is afterwards filled in with the name and signature of a person as drawer and indorser, the acceptor cannot, as against a bona fide indorsee for value, adduce evidence to show that either the drawing or indorsement is a forgery: London and S. W. Bank v. Wentworth, 5 Ex. D. 96 (1880).

Existence of payee and his capacity.

(3) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement. Imp. Act, s. 54 (2) (*c*).

A plea by an acceptor, that subsequent to his acceptance the payee became insolvent and indorsed it to the plaintiff without the knowledge of the assignee, held to be a good defence: Maclellan v. Davidson, 20 N. B. (4 P. & B.) 33- (1880).

As to forgery of the indorsement of the payee or want of authorization of his signature, see section 24.

When the payee is fictitious or non-existing, the holder may treat the bill as payable to bearer: section 7, s-s. 3. This is the law even when the acceptor is not aware that the payee is a fictitious person: Vagliano v. Bank of England, [1891] A. C. 107; Clutton v. Attenborough, [1897] A. C. 90; City Bank v. Rowan, 14 N. S. W. R. 126 (1893). § 55.

55. The drawer of a bill, by drawing it—

Liability of drawer

(*a*) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonored he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonor are duly taken;

(*b*) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse: Imp. Act, s. 55 (1) (*a*) (*b*).

(*a*) This is the ordinary undertaking of a drawer. By section 16 he may negative or limit his liability. The requisite proceedings on dishonor are set out in sections 48 and 49. These may be waived by the drawer: section 16 (*b*). For the compensation due by the drawer to the holder or indorser who pays, see section 57.

When a bill is drawn, the drawer is in the position of a principal debtor, and the indorser in that of a surety. When it is accepted the acceptor becomes the principal debtor, and the liability of the drawer and indorsers is conditional, until the bill is dishonored. It is only an indorser "who is compelled to pay" the bill, that is, who is under legal liability to pay, that can claim to be compensated by the drawer. See Horne v. Rouquette, 3 Q. B. D. at p. 519 (1878).

The acceptor, drawer and indorsers are jointly and severally liable to the holder of a bill for its acceptance and payment: Rouquette v. Overmann, L. R. 10 Q. B. at p. 537 (1875); C. C. Art. 2310; Code de Com. Art. 140.

§ 55.

Liability of drawer

If the drawer has not capacity or power to incur liability by bill, he is not liable; but other parties to the bill may be: section 22, s-s. 2.

(b) This has long been the law: Collis v. Emett, 1 H. Bl. 313 (1790). "Precluded" was inserted in the Imperial Act when it was decided to extend it to Scotland, as "estoppel" is not a term of Scotch law.

"Holder in due course" is defined in section 29.

The drawer is not precluded from denying the genuineness or validity of the indorsement by the payee.

Liability of indorser

2. The indorser of a bill, by indorsing it—

(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonored he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonor are duly taken: Imp. Act, s. 55 (2) (a).

As regards the holder of a bill an indorser has been compared to a new drawer: Penny v. Innes, 1 C. M. & R. at p. 441 (1834); Steele v. McKinlay, 5 App. Cas. at p. 769 (1880).

This sub-section sets out the ordinary contract of the indorser. It may, like that of the drawer, be varied in different ways. His liability may be limited or even negatived; or he may waive, as regards himself, some or all of the duties imposed on the holder as to presentment, protest and notice: section 16. See also sections 31 and 32, and the preceding sub-section.

As to the nature of the contract of indorsement, see the remarks of Maule, J., in Castrique v. Buttigieg, 10 Moore P. C. at p. 108 (1855).

The indorsers may have an agreement varying as between themselves the undertaking in this section, and even reversing the order in which they are to be liable to each other. If

two or more persons indorse a bill or note to accommodate the acceptor or maker, their relation to each other is that of co-sureties, irrespective of the order in which they have indorsed: Macdonald v. Whitfield, 8 App. Cas. 733 (1883). See Small v. Riddel, 31 U. C. C. P. 373 (1880). § 55.

The fact that two persons indorsed a note for the accommodation of the maker does not give the prior indorser any recourse against the subsequent indorser, unless he shows that the latter intended to assume liabilities different from those assumed by so signing: Poisson v. Bourgeois, Q. R. 17 S. C. 94 (1898); McRae v. Lionais, Q. R. 16 S. C. 262 (1899).

Estoppel of indorser.

(*b*) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;

(*c*) Is precluded from denying to his immediate or a subsequent indorsee that the bill was, at the time of his indorsement, a valid and subsisting bill, and that he had then a good title thereto. Imp. Act, s. 55 (2) (*b*) (*c*).

An indorser by putting his name on the back of the bill has in effect made these representations, and he is estopped from denying them to one who has in good faith given value for it while current, without notice of any defect.

ILLUSTRATIONS.

1. In an action against the last indorser, it is no defence that the names of the maker and prior indorsers are forged: Eastwood v. Westley, 6 U. C. O. S. 55 (1839); McLeod v. Carman, 12 N. B. (1 Han.) 502 (1869).

2. The indorser of an unaccepted bill is estopped from denying the signature or the competence of the drawer, a married woman: Ross v. Dixie, 7 U. C. Q. B. 414 (1850). See also Griffin v. Latimer, 13 U. C. Q. B. 187 (1856); Hanscome v. Cotton, 16 U. C. Q. B. 98 (1857).

§ 56.

Estoppel of indorser

3. The indorser of a note made by a corporation is estopped from alleging that it was ultra vires: Merchants' Bank v. United Empire Club Co., 44 U. C. Q. B. 468 (1879).

4. An indorser sued on a note by the indorsee cannot plead that the note is null, because made by a married woman without the authorization of her husband: Leblanc v. Rollin, Mont. Cond. Rep. 68 (1854); Norris v. Condon, 14 Q. L. R. 184 (1888).

5. An accommodation indorser cannot in an action by a holder in due course, plead that the signature of the maker is forged: Choquette v. Leclaire, Q. R. 19 S. C. 521 (1900).

6. A note in favor of two payees jointly was indorsed by one of them to a person who in turn indorsed it to another. The latter sued the payee who had indorsed. Held, that defendant was estopped from setting up the want of indorsement by the other payee: Thurgar v. Clarke, 4 N. B. (2 Kerr) 370 (1844).

7. Where a partner, having authority to draw and indorse, raised money for firm use by drawing bills in fictitious names and indorsing them in the firm name, the other partner was liable to an indorsee: Thicknesse v. Bromilow, 2 Cr. & J. 425 (1832).

8. A plea denying the indorsement to defendant who indorsed it to plaintiff is bad: MacGregor v. Rhodes, 6 E. & B. 266 (1856). See Lambert v. Pack, 1 Salk. 127 (1690); Bomley v. Frazier, 1 Stra. 441 (1721).

9. An indorsement for collection on a cheque made by one bank in sending it to another for payment, not being an indorsement for transfer and sale, does not carry with it a guarantee of previous indorsements: First Nat. Bank v. City Nat. Bank, 182 Mass. 130 (1902).

Stranger signing bill, liable as indorser.

56. Where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course, and is subject to all the provisions of this Act respecting indorsers. Imp. Act, s. 56.

This section in the Imperial Act ends with the words "due course." The last clause was added in the Senate in order to make it clear that a person who signs a bill as warrantor is entitled to notice of dishonor. In Quebec, under Article 2311 of the Civil Code, a warrantor, or aval, as

called in French law, was bound whenever the party for whom he became warrantor was bound, and he was not entitled to any notice of dishonor or protest, apart from that given to his warrantee or principal. § 56.

The English decisions regarding such warrantors were not uniform or consistent; but this section of the Imperial Act was framed in accordance with the doctrine laid down in Steele v. McKinlay, where it was held that a person who put his name on the back of a bill was not liable on the bill to the drawer. In Jenkins v. Coomber, [1898] 2 Q. B. 168, it was held by a Divisional Court that such a person was not liable to the drawer, even when the bill was payable to the order of the drawer. It had been long settled in England that he could not be held liable as an acceptor, as he was not a drawee, or an acceptor supra protest. Warrantors.

The aval was fully recognized in French law, both ancient and modern. Pothier speaks of it. Change, No. 122, as "the contract of warranty undertaken by a person, either for the drawer, by putting his signature at the foot of the bill; or for the indorser by signing below the indorsement; or for the acceptor by signing below the acceptance." Such person assumes towards the creditor all the obligations of the party whose warrantor he becomes. See Code de Com. Arts. 141, 142; Nouguier. §§ 821-840. It is also recognized in Louisiana: McGuire v. Bosworth, 1 La. Ann. 248 (1846). Aval.

In Lower Canada before the Code, it was held, following the old French law prior to the Commercial Ordinance of 1673, that an indorser "pour aval" was not entitled to notice of dishonor or protest, and this rule was adopted by the Civil Code in Article 2311.

It is to be observed that the person signing a bill otherwise than as a drawer or acceptor, is not called an "indorser." He has been called a quasi-indorser: Wakefield v. Alexander, 17 T. L. R. 217 (1901). It is only to a holder in due course that he is said to incur the liabilities of an indorser. Section [illegible] s-s. 2, defines what these liabilities are. They may be Liability assumed.

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Liability of indorser.

varied as provided in section 16. The Imperial Act does not even say that he has the rights of an indorser; but the latter are clearly given him here by the added words. As between the immediate parties, these rights and liabilities may be varied by agreement; if the bill has not passed into the hands of a holder in due course it may be subject to these as defects of title.

Under the old practice where a person not the holder of a bill signed it as guarantor he could be made liable to the payee by the latter signing his name "without recourse" above that of the guarantor. See cases under Illustration 3 below. In Duthie v. Essery, 22 Ont. A. R. 191 (1895), Burton, J.A., called this a clumsy contrivance and unnecessary; but he was of opinion that such a guarantor was not liable to the payee, but only to a subsequent holder in due course.

The decisions of our Courts on this section have been very conflicting and contradictory, and in most of them the difference between our Act and the Imperial Act has not been considered.

In Watson v. Harvey, 10 Man. 641 (1894), where defendant had put his name on the back of the note before its delivery to plaintiffs the payees, he was held liable to them, by the full Court, and this case was followed in Wells v. McCarthy, 10 Man. 639 (1895), where the facts were similar.

In Duthie v. Essery, above cited, the notes sued on were indorsed by defendant before delivery to the payees, who, after maturity and dishonor, indorsed them below defendant's signature and delivered them to plaintiff. The Ontario Court of Appeal held defendant liable as an indorser, although plaintiff was not a holder in due course.

A note made by two joint makers was not paid at maturity, and at the request of one of them a third party signed below them as additional security. The latter was held liable under this section to the payee as an indorser: Carrique v. Beaty, 28 O. R. 175 (1896); but on appeal it was held that he was a new maker, and one of the original makers who

had not consented to the addition, was held to be freed on account of this material alteration of the note: 24 Ont. A. R. 302 (1897). In Pegg v. Howlett, 28 O. R. 473 (1897), the defendants, who had indorsed a note above the payee, and as sureties for the makers, were held liable by the Divisional Court to the payees. In Robertson v. Davis, 27 S. C. Can. 571 (1897), Sedgwick, J., says (p. 574): "Under no circumstances can the payee of a promissory note or the drawer of a bill of exchange maintain an action against an indorser where the action is founded upon the instrument itself"; but the appeal was dismissed on other grounds. § 56.

In Clapperton v. Mutchmor, 30 O. R. 595 (1899); Canadian Bank of Commerce v. Perram, 31 O. R. 116 (1899); Small v. Henderson, 27 Ont. A. R. 492 (1899); and Secor v. Gray, 3 O. L. R. 34 (1901), the case of Jenkins v. Coomber, and the dictum in Robertson v. Davis, supra, were followed and approved.

In Quebec the Courts have held that under the Act a person not a holder who indorses a note before the payee is liable to the latter as a warrantor or aval, as under the Code; but that he is now entitled to notice of dishonor like an ordinary indorser: Emard v. Marcille, Q. R. 2 S. C. 525 (1892), and 3 S. C. 268 (1893); Banque Jacques Cartier v. Gagnon, Q. R. 5 S. C. 499 (1894). So also in Nova Scotia: Balcolm v. Phinney, 30 C. L. J. 240 (1892); and in New Zealand, where the section is identical with that in the Imperial Act: Cook v. Fenton, 11 N. Z. L. R. 505 (1895).

In Ayr American Plough Co. v. Wallace, 21 S. C. Can. 256 (1892), where the payees sued respondent as maker because he had indorsed a note before delivery to them, he was held not liable as maker. This was before the Act, and no notice of dishonor had been given him. In that case Strong, J., said (p. 260), that if the case were under the Act, respondent would have been liable as an indorser, but only as an indorser.

It has also been held recently in Massachusetts and New York that a person indorsing a note before delivery to the

§ 56. payee is liable to the latter: Reed v. Bacon, 175 Mass. 407 (1900); Davis v. Bly, 164 N. Y. 527 (1900).

Liability of indorser

The Supreme Court of Canada has adopted the views of the Courts of Quebec, Nova Scotia, Manitoba and New Zealand, and of the earlier Ontario cases above referred to. In Robinson v. Mann, 31 S. C. Can. 484 (1901), the respondent had indorsed a note before its delivery to the payee, and the Court held that this indorsement operated under this section of the Act as what had long been known in French law as an "aval," a form of liability which by the statute was adopted in English law, and that respondent had become liable to the payee as an indorser, and was not a mere guarantor.

ILLUSTRATIONS.

See section 23, and illustrations ante, p. 131.

1. A bill or note is payable to bearer, or is indorsed in blank A person who puts his name on it to enable another to negotiate it, or who signs and negotiates it himself, is liable as an indorser to the holder: Scott v. Douglas, 5 U. C. O. S. 207 (1836); Ramsdell v. Telfer, 5 U. C. Q. B. 508 (1848); Booth v. Barclay, 6 ibid 215 (1849); Vanleuven v. Vandusen, 7 ibid. 176 (1849); Fairclough v. Pavia, 9 Ex. p. 695 (1854).

2. A. made a note, payable to B. or order, and C. wrote his name on the back, without B.'s first indorsement. Held, that C could not be considered as a new maker, and that the note would not support a recovery against him by B.: Steer v. Adams, 6 U. C. O. S. 60 (1839); Jones v. Ashcroft, ibid. 154 (1841); Wilcocks v. Tinning, 7 U. C. Q. B. 372 (1850), Skilbeck v. Porter, 14 ibid. 430 (1856); Moffatt v. Rees, 15 ibid. 522 (1857); Robertson v. Lonsdale, 21 O. R. 600 (1892); Morton v. Campbell, 3 N. S. (Cochran) 5 (1859); Burns v. Snow, 9 N. S. (3 G. & O.) 530 (1875); Smith v. Hill, 6 N. B. (1 Allen) 213 (1848); Ayr American Plough Co. v. Wallace, 21 S. C. Can. 256 (1892); Tai Yune v. Blum, 3 B. C. R. 21 (1893); Gwinnell v. Herbert, 5 A. & E. 436 (1836).

3. A. made a note to the order of B. for value, and before delivery it was indorsed by C. as surety for the maker. B. indorses it "without recourse" above C.'s signature, and then sues C. He can recover: Peck v. Phippon, 9 U. C. Q. B. 73 (1851); Smith v Richardson, 16 U. C. C. P. 210 (1865). See also, Wordsworth v

Macdougall, 8 U. C. C. P. 403 (1858); Wilders v. Stevens, 15 M. & W. 208 (1846); Smith v. Marsack, 6 C. B. 486 (1848); Morris v. Walker, 15 Q. B. 589 (1850); Wilkinson v. Unwin, 7 Q. B. D. 636 (1881); Holmes v. Durkee, 1 C. & E. 23 (1883); Seabury v. Hungerford, 2 Hill (N.Y.) 80 (1841); Hall v. Newcomb, 3 Hill (N.Y.) 233 (1842).

4. Defendant having indorsed, as security for the maker, a promissory note payable to plaintiff, but not negotiable, he was held not liable as a maker: West v. Bown, 3 U. C. Q. B. 290 (1846); McMurray v. Talbot, 5 U. C. C. P. 157 (1855). Contra, Piers v. Hall, 18 N. B. (2 P. & B.) 34 (1878).

5. A guarantee indorsed on a note at the time of its execution as follows: "We guarantee the payment of the within note," does not show a sufficient consideration for the promise, the case being within the Statute of Frauds: Lock v. Reid, 6 U. C. O. S. 295 (1842).

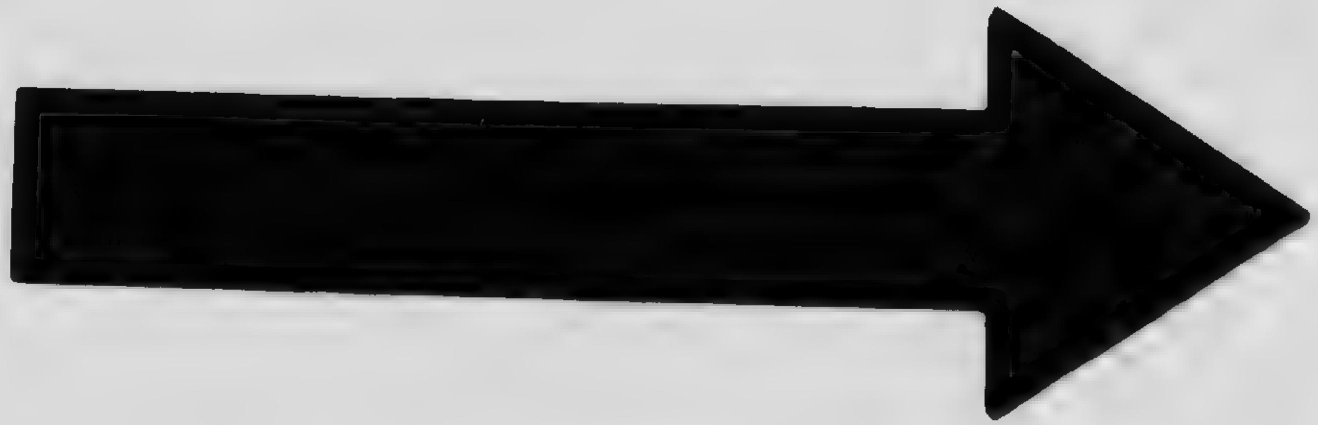
6. Defendant owing plaintiff delivered him a note made by a third party payable to defendant or bearer, on the back of which defendant had written "In consideration of $100, I guarantee payment of the within note." Held, that defendant was liable without notice of dishonor: Palmer v. Baker, 23 U. C. C. P. 302 (1873).

7. Defendant indorsed on a note "I guarantee the payment of the within note to D. (the payee and plaintiff) on demand." This was done to secure time, which was given. Defendant was not liable as an indorser, the note never having been negotiated, but he was held liable as a guarantor: Davies v. Funston, 45 U. C. Q. B. 369 (1880).

8. Plaintiff lent money to a firm. One partner made and the other indorsed a non-negotiable note in plaintiff's favor for the amount. The indorser was held liable as a guarantor: McPhee v. McPhee, 19 O. R. 603 (1890); overruled by Robertson v. Lonsdale, 21 O. R. 600 (1892).

9. Defendant put his name on the back of a note as guarantor for the maker. The note was dishonored and defendant duly notified. The payee indorsed the note below defendant. Held that plaintiff as holder was entitled to recover from defendant: Duthie v. Essery, 22 Ont. A. R. 191 (1895).

10. In Quebec one who puts his name on the back of a note before its delivery or indorsement by the payee, is an indorser pour aval, and is liable without notice of protest or dishonor: Paterson v. Pain, 1 L. C. R. 219 (1851); Merritt v. Lynch, 3 L. C. J. 276 (1859); Pariseau v. Ouellet, Mont. Cond. Rep. 69 (1850); Narbonne



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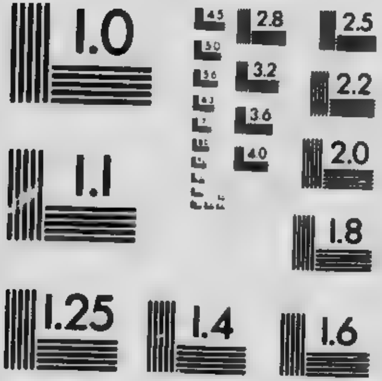

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v. Tetreau, 9 L. C. J. 80 (1863); Latour v. Gauthier, 2 L. C. L. J. 109 (1866). Also one who puts his name on the back of a cheque payable to bearer: Pratt v. MacDougall, 12 L. C. J. 243 (1868).

11. An indorser pour aval is liable on a note although it is null because made by a married woman without authorization by her husband: Norris v. Condon, 14 Q. L. R. 184 (1888).

12. Under the Code, an aval was not entitled to notice of dishonor, and the Act of 1890 is not retroactive, so as to apply to bills or notes made before its coming into force: Fyfe v. Boyce, 21 R. L. 4 (1891); Coutu v. Rafferty, M. L. R. 7 S. C. 146 (1891).

13. Where before the Act an indorser signed below the payee, the presumption is that he is not an aval, but an ordinary indorser; and the fact that he was never holder of the note, but indorsed it merely for the accommodation of the maker, is not sufficient to destroy this presumption: Merchants' Bank v. Cunningham, Q. R. 1 Q. B. 35 (1892).

14. In English law there cannot be an aval on the bill for the honor of the acceptor: Jackson v. Hudson, 2 Camp. at p. 448 (1810).

15. Where two or more persons become parties to a bill to accommodate some third party, their rights and liabilities between themselves are those of co-sureties, and must be determined irrespective of the position of their names on the instrument. Parol evidence is admissible to prove the circumstances: Vallee v. Talbot, Q. R. 1 S. C. 223 (1892); Reynolds v. Wheeler, 10 C. B. N. S. 561 (1861); Clipperton v. Spettigue, 15 Grant, 269 (1868); Cockburn v. Johnston, ibid. 577 (1869); Macdonald v. Whitfield, 8 App. Cas. 733 (1883), overruling Ianson v. Paxton, 23 U. C. C. P. 439 (1874); and Fisken v. Meehan, 40 U. C. Q. B. 146 (1876).

16. The indorsement of a bill by one who is not the holder, but a stranger to it, is efficacious in English law. It creates no obligation to those who previously were parties to it, it is solely for the benefit of those who take it subsequently. To hold that a stranger to a bill who writes his name across the back of it, before it has passed out of the hands of the drawer, thereby becomes liable to the drawer, failing payment by the drawees, is inconsistent with the principles of the law merchant: Steele v. McKinlay, 5 App. Cas. at pp. 772, 782 (1880). See Hill v. Lewis, 1 Salk. at p. 133 (1710); Penny v. Innes, 1 C. M. & R. 439 (1834).

17. The fact that one person writes his name on the back of a bill of exchange and hands it to another, does not necessarily consti-

tute the former an indorser, where the other is not a holder in due course: Westacott v. Smalley, 1 C. & E. 124 (1883). § 57.

18. Plaintiff drew a bill to his own order, which was accepted by the drawees, and guaranteed by defendant. The acceptors desiring time, plaintiff offered to consent if defendant would continue his guarantee. He wrote a letter and put his name on the back of the bill. Held, that defendant was not liable as an indorser, as the bill was never negotiated: but the bill and letter read together were sufficient to satisfy the Statute of Frauds and he was liable as a guarantor: Singer v. Elliott, 4 T. L. R. 524 (1888).

19. Plaintiff drew a bill to his own order for an advance to be made to the acceptor on condition the latter got an indorser. On getting the bill accepted and indorsed, he then signed as drawer, and indorsed below the signature of the indorser. No agreement with the indorser was proved. Held, that plaintiff was not a holder; there was nothing in the Bills of Exchange Act to take the case out of the law merchant, which did not allow the drawer to sue an indorser: Mander v. Evans, 5 T. L. R. 75 (1888).

20. A director of a company which was trying to get a bill discounted for the drawer, stamped the company's name on the back, and wrote his own name opposite the word "Director." It required two directors to sign for the company. Not succeeding, he returned the bill to the drawer, leaving the incomplete indorsement inadvertently uncancelled. The drawer negotiated it. Held, that the director had not "signed" the bill, and was not liable as an indorser: London & Southern Cos. I. A. & D. Co. v. Clamp, 7 T. L. R. 131 (1890).

21. A bill of exchange bore an indorsement to the effect that in case of non-payment by the acceptors, it was to be presented to the defendant. It was held that the indorsement which defendant had signed was not a part of the bill, and he could not be sued as an indorser, but was liable as a guarantor: Stagg v. Brodrick, 12 T. L. R. 12 (1895).

Measure of damages against parties to dishonored bill.

57. Where a bill is dishonored, the measure of damages which shall be deemed to be liquidated damages, shall be as follows:

(*a*) The holder may recover from any party liable on the bill, the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay

§ 57. the bill may recover from the acceptor or from the drawer, or from a prior indorser—

(1) The amount of the bill;

(2) Interest thereon from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case;

(3) The expenses of noting and protest: Imp. Act, s. 57 (1) (*a*) (*b*) (*c*).

This section applies when a bill is dishonored, either by non-acceptance: section 43; or by non-payment: section 47. Recovery is had when the parties named have no valid defence.

(*a*) This clause does not apply to bills dishonored abroad. These fall exclusively under the next clause (*b*). Re Commercial Bank of South Australia, 36 Ch. D. 522 (1887). It has been held in England, under the similar clause of the Imperial Act, that where a foreign drawer has paid re-exchange, he may recover it from the English acceptor in addition to the items (1), (2) and (3) named: Ex parte Robarts, Re Gillespie, 18 Q. B. D. 286 (1886). See Re General South America Co., 7 Ch. D. 637 (1877).

(1) **Amount of the Bill.**—If the bill bears interest from its date or issue this would be included: section 9; Crouse v. Park, 3 U. C. Q. B. 458 (1847); Hudson v. Fawcett, 7 M. & G. 348 (1844). So would exchange if indicated in the bill: section 9 (*d*), section 71, s-s. 2 (*d*).

(2) **Interest.**—This clause applies only to interest allowed as damages for non-payment of the bill at maturity. As to interest provided for by the bill itself which forms part of the bill or debt, see section 9, pp. 72, 73 ante. The rule in this clause is in accordance with the general rule as to interest. See R. S. O. c. 51, s. 114; C. C. Arts. 1067, 1069, 1070, 1077.

The rate of interest allowed by the law of Canada was formerly six per cent.: R. S. C. c. 127, s. 2. Since the 7th of July, 1900, it has been five per cent.: 63-64 V. c. 29, s. 1. § 57.

A third sub-section in the English Act giving the Courts or jury a discretion as to the rate of interest to be allowed as damages was not adopted for Canada.

(3) **Expenses.**—As to these see section 93, s-ss. 2, 3. Under this term the expense of protesting for better security is not included; nor is commission: Re English Bank of the River Plate, Ex parte The Bank of Brazil, [1893] 2 Ch. 438.

ILLUSTRATIONS.

1. Where a bill or note is payable with interest at a certain rate, this rate governs after maturity: Howland v. Jennings, 11 U. C. C. P. 272 (1861); Montgomery v. Boucher, 14 U. C. C. P. 45 (1864); O'Connor v. Clarke, 18 Grant, 422 (1871); Keene v. Keene, 3 C. B. N. S. 144 (1857). Overruled by No. 7 below.

2. In the absence of proof, interest will be allowed at the rate allowed by our law on a note dated and payable in the United States: Griffin v. Judson, 12 U. C. C. P. 430 (1862).

3. Where a note fixes the rate to be [illegible] after maturity "and until paid," this will be allowed, in the absence of fraud, however exorbitant: Young v. Fluke, 15 U. C. C. P. 360 (1865).

4. Where a note was dated and payable in New York, but discounted in Canada, the law of Canada governs as to interest: Cloyes v. Chapman, 27 U. C. C. P. 22 (1876).

5. Where the holder of a note recovered judgment with costs against the maker and indorser, and the indorser paid and took an assignment of the judgment, he is entitled under R. S. O. c. 116, s. 3, to recover from the maker the whole of the judgment, including costs: Harper v. Culbert, 5 O. R. 152 (1883).

6. Where indorsers waived protest, the interest after maturity was not fixed by C. S. U. C. c. 42, s. 13, so as to enable the holder to rank for it under the Insolvent Act: Re Macdougall, 12 Ont. A. R. 265 (1885).

7. A note for $3,000, payable six months after date "with interest at the rate of two per cent. per month until paid," only bears interest at the legal rate of six per cent. after maturity: St. John

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Interest on bill.

v. Rykert, 10 S. C. Can. 278 (1884). See also Dalby v. Humphrey, 37 U. C. Q. B. 514 (1875); Simonton v. Graham, 8 Ont. P. R. 495 (1881); Powell v. Peck, 15 Ont. A. R. 138 (1888); Grant v. People's Loan and Deposit Co., 18 S. C. Can. 262 (1890); Cook v. Fowler, L. R. 7 H. L. 29 (1874).

8 In Quebec under the old law a note payable on demand bore interest from its date: Dechantal v. Pominville, 6 L. C. J. 88 (1860); but under the Code, only from demand and default: Cleroux v. Pigeon, 32 L. C. J. 236 (1888).

9. "Bank charges" on a specially indorsed writ is a sufficient description of the expenses of noting: Dando v. Boden, [1893] 1 Q. B. 318. As to an indorsement for interest, see London & Universal Bank v. Clancarty, [1892] 1 Q. B. 689; Lawrence v. Willcocks, ibid. 596; McVicar v. McLaughlin, 16 Ont. P. R. 450 (1895).

Further damages.

(*b*) In the case of a bill which has been dishonored abroad, in addition to the above damages, the holder may recover from the drawer or any indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment. Imp. Act, s. 51 (2).

Re-exchange is the amount which the party who has been compelled to pay the dishonored bill would have to pay for a sight bill, drawn at the time and place of dishonor at the then current rate of exchange on the place where the drawer or indorser sought to be charged resides, to cover the amount of the dishonored bill with interest and expenses: De Tastet v. Baring, 11 East, at p. 269 (1809); Suse v. Pompe, 8 C. B. N. S. at pp. 566, 567, (1860); Willans v. Ayers, 3 App. Cas. at p. 146 (1877).

The same rule prevails in the United States: Bank of the United States v. United States: 2 How. 727 (1844).

The provisions of this section apply to promissory notes with the necessary modifications: section 88.

No percentage allowed.

It will be observed that the present Act does not recognize or allow the further damages formerly allowed on bills

drawn or negotiated in Canada and dishonored by non-payment abroad. In the various provinces there was allowed a percentage from ten per cent. downward. By the Dominion Act of 1875, embodied in R. S. C. c. 123, s. 6, it was abolished for any part of Canada or Newfoundland and reduced to two and a half per cent. for other countries. See Foster v. Bowes, 2 U. C. P. R. 256 (1857); Bank of Montreal v. Harrison, 4 U. C. P. R. 331 (1868). § 58.

Trans-ferrer by delivery.

58. Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a "transferrer by delivery": Imp. Act, s. 58 (1).

A bill payable to bearer is one which is expressed to be so payable, or on which the only or last indorsement is in blank: section 8, s-s. 3. The holder of such a bill is the person in possession of it: section 2 (*d*) (*g*). It is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder: section 31. Such a negotiation is a sale of the instrument.

Liability.

2. A transferrer by delivery is not liable on the instrument: Imp. Act, s. 50 (2).

No person is liable as drawer, indorser or acceptor of a bill who has not signed it as such: section 23. See Ex parte Roberts, 2 Cox, 171 (1789); Bank of England v. Newman. 1 Ld. Raym. 442 (1700); Fenn v. Harrison, 3 T. R. 757 (1790).

On consid-eration.

The transferrer by delivery, although not liable on the instrument itself, may in certain cases, in the event of its dishonor, be liable on the consideration for which the bill has been transferred: Merchants' Bank v. Whidden, 19 S. C. Can. 53 (1891). This is the case if the bill was given for an antecedent debt: Mitchell v. Holland. 16 S. C. Can. 687 (1889); Ward v. Evans, 2 Ld. Raym. 930 (1703); Camidge v. Allenby, 6 B. & C. 382 (1827); Guardians of Lichfield

§ 58. v. Greene, 1 H. & N. 884 (1857). Or if the delivery was not intended to operate a full and final discharge of the liability of the transferrer: Van Wart v. Woolley, 3 B. & C. 446 (1824).

Transferee must use diligence. The transferee, in order to hold the transferrer liable, must act with reasonable diligence in seeking to obtain payment, and in giving notice of dishonor or repudiating the transaction: Conn v. Merchants' Bank, 30 U. C. C. P. 380 (1879); Rogers v. Langford, 3 Tyr. 654 (1833); Moule v. Brown, 4 Bing. N. C. 266 (1838); Robson v. Oliver, 10 Q. B. 704 (1847).

Where a person changes bank notes or cashes a cheque payable to bearer to oblige the holder, he can recover back the money if the bank has stopped payment or if the cheque is dishonored, provided he acts with diligence: Conn v. Merchants' Bank, supra; Turner v. Stones, 7 Jur. 745 (1843); Timmins v. Gibbins, 18 Q. B. 722 (1852); Woodland v. Fear, 7 E. & B. 519 (1857).

Where bill brokers got bills discounted at their banker's for the drawer and acceptor, and made themselves liable to the banker by a separate document but did not indorse the bills, they were, on payment of the bills, held entitled to rank on the estate of the acceptor as if they had actually indorsed the bills: Ex parte Bishop, 15 Ch. D. 400 (1880).

Warranty. 3. A transferrer by delivery who negotiates a bill thereby warrants to his immediate transferee, being a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless. Imp. Act, s. 58 (3).

Subject to the conditions mentioned under the preceding sub-section, these three warranties appear to comprise all that were recognized in England or Canada before the Act. In some of the United States such a transferrer is held also to

warrant the solvency of the maker at the time of the transfer: § 58.
Roberts v. Fisher, 43 N. Y. 159 (1870); Wainwright v. Webster, 11 Vt. 576 (1839); Westfall v. Braley, 10 Ohio St. 188 (1859); while in others the English rule is followed: Young v. Adams, 6 Mass. 182 (1810); Milliken v. Chapman, 75 Me. 306 (1883).

As appears from some of the illustrations below, the word "valueless" need not be taken in a strictly literal sense. Transferrer by delivery.

ILLUSTRATIONS.

1. A transferrer by delivery for value impliedly warrants that the maker is not insolvent to his knowledge: Lewis v. Jeffery, M. L. R. 7 Q. B. 141 (1875). See Fenn v. Harrison, 3 T. R. 759 (1790); Delaware Bank v. Jarvis, 20 N. Y. 228 (1859); Bridge v. Batchelder, 9 Allen (Mass.) 394 (1864).

2. The transferrer of an unindorsed note represented it to be as good as gold when the parties were insolvent to his knowledge. He was held liable for the amount: Miller v. Daudelin, 24 L. C. J. 208 (1879).

3. A vendor of a bill impliedly warrants that it is of the kind and description that it purports on its face to be: Gompertz v. Bartlett, 2 E. & B. 849 (1853).

4. C. discounts with D. a bill payable to bearer without indorsing it, which, unknown to C., had been fraudulently altered in amount by a previous holder. D. can recover from C. the money he paid: Jones v. Ryde, 5 Taunt. 488 (1814); Burchfield v. Moore, 3 E. & B. 683 (1854); Bell v. Dagg, 60 N. Y. 530 (1875).

5. A bill broker discounts with a bank a bill indorsed in blank by the payee. The indorser absconds and the signatures of the drawer and acceptor turn out to be forgeries. The bank can recover from the broker the money it paid: Fuller v. Smith, R. & M. 49 (1824).

6. An agent gets a bank to discount a bill drawn and indorsed in blank by his principal, and then pays over the money to his principal. The signature of the acceptor was a forgery, but the agent did not know it. The drawer fails. The bank cannot recover from the agent: Ex parte Bird, 4 De G. & Sm. 273 (1851).

7. The bona fide holder of a bill purporting to be drawn by A., accepted by B., and indorsed in blank by C., discounts it with a

§ 58. banker. It turns out that the signatures of A. and B. were forgeries, and that C., whose indorsement was genuine, is insolvent. The banker can recover from the holder the money he paid: Gurney v. Womersley, 4 E. & B. 130 (1854); Allen v. Clark, 49 Vt. 390 (1877).

8. When the transferee discovers the defect in the bill, he must repudiate the transaction with reasonable diligence: Pooley v. Brown, 11 C. B. N. S. 566 (1862).

Discharge of Bill.

Sections 59 to 63, inclusive, treat of the circumstances under which a bill is discharged. These are, payment by the acceptor, his becoming the holder, his being released, or the bill being cancelled or materially altered. Section 61, s-s. 2, treats of the release of a party to a bill from his liability thereon, without the bill itself being discharged. Section 48 had provided for the discharge of a drawer or indorser to whom notice of dishonor was not given.

Besides the foregoing, the liability of a party to a bill may be terminated by the other means by which a debt may be extinguished. In the Province of Quebec an obligation to pay a sum of money may become extinct by payment, by novation, by release, by compensation, by confusion, by prescription, and by some other special causes: C. C. 1138. In the other provinces a bill may be satisfied in several ways, and may be discharged in whole or in part by set-off. In connection with the five following sections these various subjects will be briefly noticed, as will also the release of a surety by the holder's dealings with the principal.

It is possible that the last section (8) of the amending Act of 1891 may have an important bearing upon these and other matters not specifically mentioned or provided for in the Act. The reader is referred to the notes upon that section for a discussion of the question.

Thus far the numbering of the sections has followed that in the Imperial Act. Section 60 of the latter provides that where a cheque or bill payable to order on demand is

drawn on a banker, and he pays it in good faith, he is not responsible, although the indorsements are unauthorized or even forged. Our Parliament struck this section out of the bill, so that section 60 of our Act is section 61 of the Imperial Act, and this difference is continued in the numbering of the succeeding sections. § 59.

59. A bill is discharged by payment in due course by or on behalf of the drawee or acceptor: Discharge by payment.

"Payment in due course" means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective; Imp. Act, s. 59 (1). Payment in due course.

Payment is not defined in the Act. A bill is for a sum certain in money, but it may be satisfied at or after maturity, in any way in which any other contract to pay money may be satisfied, and, as provided by section 61, in a manner which would not be sufficient in the case of ordinary contracts. "By payment is meant the discharge of a contract to pay money, by giving to the party entitled to receive it the amount agreed to be paid by one of the parties who entered into the agreement. Whether the transaction is a purchase or a payment, is a question to be resolved according to the intention of the parties, and looking to the substance of the matter rather than its form. Credit given by the drawee of a bill or by a party to a bill or note, who is liable for its payment to the holder at his request, is equivalent to payment. Payment of a debt is not necessarily a payment of money; but that is payment which the parties contract shall be accepted as payment, or which the law recognizes as such". 2 Daniel, § 1221.

If the drawee or acceptor pays a bill before maturity, it is not thereby discharged; he may negotiate it. If the bill is payable to bearer or indorsed in blank, he may pay to the bearer; if indorsed in full, he may pay to the indorsee or to his order. Payment is in good faith if made honestly; mere

§ 59. negligence is not enough to vitiate it: section 89. As to what may render the title of the holder of a bill defective, see section 29.

Discharge by payment. When a renewal bill is taken the original one is not discharged, unless there is a special agreement to that effect. It is a mere conditional payment. So where the bill of a third party is taken. The remedy on the original bill is suspended until the maturity of the new one; if that is paid or discharged, so is the original. If the new one is dishonored the original liability revives, except as to parties, who are merely sureties, and who may have been discharged by the delay granted to the principal debtor.

In either of the foregoing cases the renewal or new bill will operate as a discharge, if the parties have so agreed. If the holder has retained the old bill, the presumption will be, that such was not the intention of the parties: Ex parte Barclay, 7 Ves. 596 (1802); Hubbard v. Gurney, 64 N. Y. 447 (1876); Hadden v. Dooley, 92 Fed. R. 274 (1899).

If the maker of a note has the right to give a renewal, he must tender it at or before the maturity of the old one: White v. Sabiston, Q. R. 12 S. C. 345 (1896).

A bill may also be discharged by being merged in a security of a higher nature, such as a bond, mortgage, or the like. So a judgment recovered on a bill operates as an extinguishment of the original debt, the bill being merged in the judgment.

Article 1169 of the Civil Code provides that "Novation is effected (1) when the debtor contracts towards his creditor a new debt, which is substituted for the ancient one, and the latter is extinguished; (2) when a new debtor is substituted for a former one who is discharged by the creditor; (3) when by the effect of a new contract a new creditor is substituted for a former one, towards whom the debtor is discharged." Such a discharge has been considered in part under payment by bill and merger.

For discharge by "compensation" or "set-off," see post p. 325.

The provisions of this section regarding a drawee or acceptor apply to the maker of a promissory note: section 88. 59.

ILLUSTRATIONS.

1. Notes were given for the purchase money of personal property, and were not to be paid if the property was given up. The property was returned and sold for less than the first sale. Held, that the notes were satisfied by the return of the property as agreed: Smith v. Judson, 4 U. C. O. S. 134 (1835).

2. The following are examples of the discharge of the bill or note by merger in the mortgage or other security taken, although the holders may not have so intended: Matthewson v. Brouse, 1 U. C. Q. B. 272 (1843); Bank of B. N. A. v. Jones, 8 U. C. Q. B. 86 (1850); Parker v. McCrea, 7 U. C. C. P. 124 (1857); Fairman v. Maybee, ibid. 467 (1858); Fraser v. Armstrong, 10 ibid. 506 (1860). McLeod v. McKay, 20 U. C. Q. B. 258 (1860); Adams v. Nelson, 22 ibid. 100 (1862).

3. Where a mortgage or other security is taken as collateral to a bill or note, there is no merger, and the bill or note is not discharged, but may be sued if not paid, although the mortgage is not due: Murray v. Miller, 1 U. C. Q. B. 353 (1845); Bank of U. C. v. Sherwood, 8 ibid. 116 (1850); Ross v. Winans, 5 U. C. C. P. 185 (1855); Shaw v. Crawford, 16 U. C. Q. B. 101 (1857); Commercial Bank v. Cuvillier, 18 ibid. 378 (1859); Bank of U. C. v. Bartlett, 12 U. C. C. P. 238 (1862); Gore Bank v. McWhirter, 18 ibid. 293 (1868); Gore Bank v. Eaton, 27 U. C. Q. B. 332 (1868); Molsons Bank v. McDonald, 2 Ont. A. R. 102 (1877).

4. Where a note overdue has been retired and settled by a renewal note, it is cancelled and cannot be put in circulation again even by the payee, who has taken up the renewal note out of his own funds: Cuvillier v. Fraser, 5 U. C. Q. B. 152 (1848).

5. In an action by the indorsee against the acceptor of a bill, a plea of payment by the drawer is no defence, unless made on the acceptor's account and adopted by him: Bank of Montreal v. Armour, 9 U. C. C. P. 401 (1859).

6. Payment by the maker to the original holder after transfer would be at his own risk, and be no discharge though the note was overdue at the time of the transfer: Ferguson v. Stewart, 2 U. C. L. J. 116 (1866); Banque du Peuple v. Viau, 4 L. N. 133 (1880); Hawley v. Beverley, 6 M. & Gr. 221 (1843).

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Discharge by payment.

7. Taking the note of a new firm for goods sold to the old firm may operate as a release to the latter: Watts v. Robinson, 32 U. C. Q. B. 362 (1872).

8. A creditor took the note of a partner for a partnership debt, sued on it and took judgment. Failing to recover, he is not precluded from claiming against the partnership: Carruthers v. Ardagh, 20 Grant, 579 (1873).

9. Where a bank held for collection a note made by one customer in favor of the other, and on the day it matured, charged it to the maker and credited it to the payee in their books, and in his passbook, it was held to be a payment, and irrevocable: Nightingale v. City Bank, 26 U. C. C. P. 74 (1876); Cleveland v. Exchange Bank, 31 L. C. J. 126 (1887).

10. The firm of H. & M. were in the habit of buying goods from D. & C. and giving them notes for the price. They dissolved in 1876, M. carrying on the business and dealing with B. & Co. who took his notes for the running account. He failed in 1880. His payments to B. & Co. were sufficient to pay off the notes of H. & M. if so applied. Held, reversing 7 Ont. A. R. 33, that from the blending of the accounts and the course of dealing, the paper of H. & M. was fully paid: Birkett v. McGuire, Cassels' S. C. Digest, 598 (1883).

11. A note was given for goods. Before maturity the vendor who held the note agreed, on account of partial failure of consideration, to reduce it by $500. After maturity he indorsed it to M. "without recourse." Held, that M. must credit this $500 on the note: McGregor v. Bishop, 14 O. R. 7 (1887).

12. In order to vitiate the payment by the maker of a note indorsed in blank, bad faith must be shewn: Ferrie v. Wardens of the House of Industry, 1 Rev. de Leg. 27 (1845).

13. The acceptance of a promissory note is not payment or novation unless there be an evident intention that it shall have that effect: Jones v. Lemesurier, 2 Rev. de Leg. 317 (1840); Beaudoin v. Dalmasse, 7 L. C. R. 47 (1857); Brown v. Mailloux 9 ibid. 252 (1859); Noad v. Bouchard, 10 ibid. 476 (1860); Noad v. Lampson, 11 ibid. 29 (1860); Rogers v. Morris, 13 L. C. J. 20 (1869); Richard v. Boisvert, 3 R. L. 7 (1871); Mercier v. Bousquet, 5 R. L. 352 (1874); Pelletier v. Raymond, 1 R. J. 13 (1894); Patterson v. McDougall Distilling Co., 26 N. S. 209 (1894); even when there is an indorser: Landry v. Beauchamp, 13 L. N. 169 (1890).

14. Proof of the payment of a promissory note in Lower Canada is governed by the law of England, and may be made by parol: Carden v. Finley, 8 L. C. J. 139 (1860).

15. Possession of a note by the maker after maturity, is a presumption of payment, but it may be rebutted by parol: Grenier v. Pothier, 3 Q. L. R. 377 (1877); McKenzie v. Frizzell, Ramsay A. C. 77 (1874).

16. Where an insolvent has secretly agreed to pay a creditor a sum in excess of the composition note, the indorser is not discharged, but the sum so paid must go in partial discharge of the note: Martin v. Poulin, 4 L. N. 20 (1880).

17. Charging a bill in the books of the bank to the account of the drawer who had got it discounted, is not payment, nor can the acceptor, when sued by the bank, set up in compensation claims he may have against the drawer: Goodall v. Exchange Bank, M. L. R. 3 Q. B. 430 (1887).

18. The receipt of a cheque which is subsequently dishonored, is not payment, and is not a novation of the original debt: Corporation of Kingsey Falls v. Quesnel, 19 R. L. 470 (1888).

19. The holder of a bill is not obliged to accept payment before maturity: Vanier v. Kent, Q. R. 11 Q. B. 373 (1902).

20. The fact that plaintiffs did not return a note sent them by defendant, but handed it to their attorneys with the claim, is not conclusive that it was accepted even as conditional payment: Brown v. Harris, 13 N. S. (1 R. & G.) 13 (1879); Lyman v. Chamard, 1 L. C. J. 285 (1857).

21. The acceptance of a renewal note is a conditional payment, and while it is current an action will not lie on the original note: Murray v. Gastonguay, 13 N. S. (1 R. & G.) 319 (1880).

22. One of a firm who were makers of a note died, and the business was carried on by the surviving partner, who was executor of the deceased. The survivor gave a renewal note and the old one was given up to him. Held, that no novation was created, and the estate of the deceased partner remained liable: Re estate Ives, 19 N. S. 108; 7 C. L. T. 146 (1886).

23. Plaintiff agreed to advance a sum of money to defendant to fit out his vessel, the latter giving his notes for the sum, and plaintiff to take as collateral security a mortgage on the vessel and an insurance policy for the amount. Plaintiff subsequently proposed to be his own insurer, and defendant paid him the premium. The vessel was lost. Held, that the notes were paid, and the

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subsequent agreement as to the insurance could be proved by parol: McKay v. O'Neil, 22 N. S. 346 (1890).

Discharge by payment.

24. When the holder of a bill improperly sold property which he held as collateral, without notice, the note was paid only to the extent of the amount received, although the debtor might have a further claim for damages: Kinnear v. Ferguson, 9 N. B. (4 Allen) 391 (1859).

25. The fact that the holder of a note had possession of land belonging to the maker from which he might have received rent, does not operate as payment if he did not actually receive it: Simonds v. Travis, 13 N. B. (2 Han.) 14 (1870).

26. Receipt of a bill or note is prima facie only conditional payment: Stephenson v. Miller, 27 N. B. 42 (1888); Owenson v. Morse, 7 T. R. 64 (1796); Dillon v. Rimmer, 1 Bing. 100 (1822); Simon v. Lloyd, 2 C. M. & R. 187 (1835); Maxwell v. Deare, 8 Moore, P. R. 363 (1853); Bottomley v. Nuttall, 5 C. B. N. S. 122 (1858); Re London B. & S. S. Bank, 34 Beav. 332 (1865).

27. Part payment to the holder at or after maturity operates as a discharge pro tanto, and any subsequent holder takes it subject to such partial payment: Graves v. Key, 3 B. & Ad. 313 (1832).

28. Credit given to the holder of a bill by the party ultimately liable is equivalent to payment: Atkins v. Owen, 4 N. & M. 123 (1834).

29. Payment by the acceptor before maturity is equivalent to a purchase of the bill, and he may negotiate it before it becomes due: Morley v. Culverwell, 7 M. & W., at p. 182 (1840); Attenborough v. Mackenzie, 25 L. J. Ex. 244 (1856).

30. A bill is accepted by three joint acceptors, not partners. It is paid at maturity by one of them. It is discharged, and he cannot negotiate it, although he accepted it for the accommodation of the other two: Harmer v. Steele, 4 Ex. at p. 13 (1849). See as to promissory notes: Bartrum v. Caddy, 9 A. & E. 275 (1838); Beaumont v. Greathead, 2 C. B. 494 (1846).

31. The indorsee of a bill obtained it by fraud. He presented it at maturity to the acceptor, who paid it in good faith. The bill is discharged: Robarts v. Tucker, 16 Q. B. 560 (1851).

32. Payment by a banker is complete when the money is placed on the counter: Chambers v. Miller, 13 C. B. N. S. 125 (1862).

33. Bond or deed to operate as a merger must be co-extensive with the bill and between the same parties: Boaler v. Mayor, 19 C. B. N. S. 76 (1865).

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34. The payee of a note payable on demand takes a mortgage as collateral security. He transfers the mortgage, getting the amount of the note. Afterwards he indorses the note to a holder in due course. The note is not paid: Glasscock v. Balls. 22 Q. B. D. 13 (1889).

35. Defendant wrote offering to guarantee the renewal of two maturing bills of £1,048 and £462 respectively. Plaintiff took bills for £1,025 and £485. Held, that although these were not strictly renewals, the guarantee covered them, the aggregate being the same: Barber v. Mackrell, 68 L. T. N. S. 29 (1892).

36. The fact of a landlord taking a bill of exchange from his tenant for rent due is some evidence of an agreement by the landlord to suspend his remedy by distress during the currency of the bill: Palmer v. Bramley, [1895] 2 Q. B. 7.

37. When a bill becomes due and is presented for payment, and is paid in good faith, if such an interval of time has elapsed that the position of the holder may have been altered, the money so paid cannot be recovered from the holder, although indorsements on the bill subsequently prove to be forgeries: London & River Plate Bank v. Bank of Liverpool, [1896] 1 Q. B. 7.

38. Where a person of the same name as the payee or indorsee of a bill payable to order, presents it at maturity to the acceptor, who pays it, he remains liable to the real owner: Graves v. American Bank, 17 N. Y. 205 (1858).

Compensation or set-off.

Compensation in Quebec differs from set-off in the other provinces in this, that when two persons are mutually debtor and creditor, compensation takes place by the sole operation of the law. The moment two debts, equally liquidated and demandable, exist simultaneously, they are mutually extinguished in so far as they correspond: C. C. Arts. 1187, 1188. The result is that in Quebec, a bill transferred after maturity would be subject to any money claim which the acceptor might have against any prior holder at or after maturity. In the other provinces a claim arising out of some matter not connected with the bill, and which a party liable on it might set up against the holder, could not be set up against a person to whom such holder might transfer it bona fide, even after maturity. In the old phraseology it is not an equity attaching to the bill, or in the language of the Act, a defect of title. The repeal of Art. 2287 of the Code, which

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Compensation for set-off.

went farther than the law of England in this respect, and the enactment of section 8 of the amending Act of 1891, may tend to assimilate the law in Quebec to that of England in this matter.

ILLUSTRATIONS.

1. An attorney holding for collection the note of a local judge arranged to apply on the note fees payable to the maker. Certain fees were indorsed on the note and enough more were earned to pay it, but the attorney refused to credit or apply them. He afterwards absconded. It was held that the note was only discharged in part: Ketchum v. Powell, 3 U. C. O. S. 157 (1833).

2. Set-off by indorsees against the holder is no defence on a note given for the accommodation of the indorser. The indorsee of an overdue bill or note is liable to such equities only as attach to the bill or note itself, and to nothing collateral due from the indorser to the maker, or indorsee to payee: Wood v. Ross, 8 U. C. C. P. 299 (1858); Smith v. Nicholson, 19 U. C. Q. B. 27 (1859).

3. A note transferred after maturity is subject in Quebec to a money claim against any holder at or after maturity: Gibsone v. Lee, 1 Rev. de Leg. 347 (1814); Hays v. David, 3 L. C. R. 112 (1852); Duguay v. Senecal, 1 L. C. L. J. 26 (1865); Amazon Ins. Co. v. Quebec & G. P. S. S. Co., 2 Q. L. R. 310 (1876).

4. The indorser may set up in compensation any money due or paid to the maker by the holder since its maturity: Quebec Bank v. Molson, 1 L. C. R. 116 (1851).

5. An account for goods sold and delivered may be set up in compensation of a promissory note: Angers v. Ermatinger, 2 L. C. L. J. 158 (1866); Quintal v. Aubin, M. L. R. 1 S. C. 397 (1883).

6. Compensation not allowed against a bill or note because claim not equally "claire et liquide": Ryan v. Hunt, 10 L. C. R. 474 (1860); Parsons v. Graham, 15 L. C. J. 41 (1870); Perrault v. Herdman, 3 R. L. 440 (1871).

7. Claims arising after the insolvency of a company, or a judicial abandonment, cannot be set up in compensation against the liquidator or curator: Exchange Bank v. City & District Savings Bank, 14 R. L. 8 (1885); Exchange Bank v. Canadian Bank of Commerce, M. L. R. 2 Q. B. 476 (1886); Riddell v. Goold, ibid. 5 S. C. 170 (1889).

8. The maker of a note may set up in compensation against the holder the amount of a note of a third party which he gave him as

collateral, and which the latter has disposed of: Lepage v. Hamel, 19 R. L. 430 (1884). § 59.

9. The indorsee of an overdue promissory note is liable, in an action against the maker, to all equities arising out of the note transaction itself, but not to a set-off in respect of a debt due from the indorser to the maker, arising out of collateral matters: Burrough v. Moss, 10 B. & C. 558 (1830).

10. As to exchange of bills under a settlement at the clearing house, see Warwick v. Rogers, 5 M. & G. 340 (1843); Banque Nationale v. Merchants' Bank, M. L. R. 7 S. C. 336 (1891).

Prescription or the Statute of Limitations.—This is another subject as to which the law of Quebec differs from that of the other provinces, not only as to the length of time necessary to acquire the right, but also as to its nature, as to whether it merely bars the remedy on a bill or extinguishes the right of action.

In Quebec the time required is five years, reckoning from maturity: C. C. Art. 2260 (4). The debt is then absolutely extinguished, and no action can be maintained after the delay for prescription has expired: C. C. Art. 2267. This was also the law before the Code: Cote v. Morrison, 2 L. C. J. 206 (1858); Lavoie v. Crevier, 9 L. C. R. 418 (1859); Bardy v. Huot, 11 L. C. R. 200 (1861); Giard v. Giard, 15 L. C. R. 494 (1865); Bowker v. Fenn, 10 L. C. J. 120 (1865); Giard v. Lamoureux, 16 L. C. R. 201 (1865).

The Code also contains the following provisions regarding the interruption of prescription:—No indorsement on a note or bill made by a person receiving payment will take it out of the operation of the law: Art. 1229. Where the amount exceeds $50, no promise or acknowledgment is sufficient, unless in writing and signed by the party making the promise: Art. 1235. Prescription cannot be renounced by anticipation, but time acquired may be renounced: Art. 2184. Renunciation by any person does not prejudice his co-debtors, his sureties, or third parties: Art. 2229.

Prescription runs against absentees: Art 2232—also against married women, minors, idiots, madmen and insane

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persons, saving their recourse against those who legally represent them: Arts. 2234, 2269. It does not run with respect to debts depending on a condition until the condition happens; or debts with a term until the term has expired: Art. 2236. Any one or more of the following prescriptions may be invoked in Quebec:—(1) Any prescription entirely acquired under foreign law, on a bill payable outside of Quebec, in favor of a person living abroad. (2) Any prescription entirely acquired in Quebec, reckoning from maturity, on a bill payable there, when the party was domiciled there at maturity, in other cases from the time he became domiciled there. (3) Any prescription resulting from the lapse of successive periods in the preceding cases, when the first period elapsed under the foreign law: Art. 2190. As to a conflict of these laws, see section 71 and notes thereon. The Code contains no express provisions as to evidence regarding bills and notes, therefore, in an action on a note made before the present Act, by Arts. 2240 and 2241 recourse must be had to the law of England in force on the 30th of May, 1849. Under this proof may be made by parol of a payment on account, and this is sufficient to interrupt prescription. Art. 1235 does not apply to proof of such payment: Boulet v. Metayer, Q. R. 23 S. C. 289 (1902).

In the other provinces the time required is six years. The English Statutes, 21 James I. c. 16, and 3 & 4 Anne c. 8, establishing this limitation as to bills and notes, were introduced into the other provinces as set out ante pp. 8-15: but were never law in Lower Canada: Butler v. Macdouall. 2 Rev. de Leg. 70 (1835); Russell v. Fisher, 4 L. C. R. 237 (1854); Langlois v. Johnston, ibid. 357 (1854). There has also been provincial legislation fixing this time in Nova Scotia and New Brunswick: R. S. N. S. c. 167; C. S. N. B. c. 85. Under these Acts a promise or acknowledgment must be in writing and signed by the party chargeable, to take a case out of the statute. Payment may have such effect, but an indorsement on a bill or note by the party receiving or his agent, is not sufficient. No person is liable

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on account of the act or promise of his co-contractor or debtor, and one may be liable and may be sued without the other. Action by or against minors, married women, or insane persons may be brought within six years from the removal of the disability. In New Brunswick, absentees are placed on the same footing; in Nova Scotia the provision applies only to actions to be brought against them. In Ontario there are two Acts—R. S. O. c. 72, relating to the Limitation of Actions, and c. 146, to Written Promises. The former allows minors and persons non compos mentis six years after the removal of the impediment to bring an action; allows the same time after his return to the province, to sue an absentee; and provides that time shall run in favor of a joint debtor, although one or more joint debtors may be out of the province. Chapter 146 provides that a promise to take a case out of the statute must be in writing and signed by the party chargeable; that in case of joint contractors, or executors or administrators of any contractor, a promise or payment by one shall not bind the others: that no indorsement on a bill or note by the party receiving payment shall be sufficient; and that a ratification after majority, of a contract during infancy, must be in writing.

When it begins to run

Ordinarily the statute begins to run when a bill matures or is dishonored. Prescription begins to run on the day following the last day of grace: Dupuis v. Hudon, Q. R. 12 S. C. 227 (1897). If it is payable on demand, it has been held in Quebec, that prescription runs from its date or its issue (illustration No. 17 post); and this was considered to have been the case in England: Byles, p. 359; Norton v. Ellam, 2 M. & W. 461 (1837). It has, however, been considered latterly that bills payable on or after demand, or at sight, or a fixed period after sight, should be on the same footing as other bills, and the statute should only run from their dishonor or maturity. See Re Boyse, 33 Ch. D. 612 (1886); Re Bethell, 34 Ch. D. 561 (1887); Sparham v. Carley, 8 Man. 246 (1892). But see the following cases where it was held that the statute runs from the date of a demand note: Brown v. Brown, [1893] 2 Ch. at p. 394; Edwards v.

§ 59. Walters, [1896] 2 Ch. at p. 162; Boulton v. Langmuir, 24 Ont. A. R. at p. 622 (1897).

See section 57 (*a*) (2), where interest, as damages on a dishonored bill, runs from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case. The principle there involved is somewhat analogous to that in the present question.

Law of England.

Chalmers (p. 293) lays down the following five rules as embodying the law of England on the subject:—

1. Subject to the case provided for by section 48 (1), and rule 5, no action on a bill can be maintained against any party thereto after the expiration of six years from the time when a cause of action first accrued to the then holder against such party.

2. As regards the acceptor, time begins to run from the maturity of the bill, unless—

(1) Presentment for payment is necessary in order to charge the acceptor, in which case time (probably) runs from the date of such presentment; or

(2) The bill is accepted after its maturity, in which case time (probably) runs from the date of acceptance.

3. As regards the drawer or an indorser, time (generally) begins to run from date when notice of dishonor is received.

4. When an action is brought against a party to a bill to enforce an obligation collateral to the bill, though arising out of the bill transaction, the nature of the particular transaction determines the period from which the time begins to run.

5. Any circumstance which postpones or defeats the operation of the Statute of Limitations in the case of an ordinary contract postpones or defeats it in like manner in the case of a bill. No indorsement or memorandum of any payment written or made upon a bill by or on behalf of the party to whom such payment is made, is sufficient to defeat the operation of the statute.

ILLUSTRATIONS.

The following expressions have been held not sufficient to take the case out of the statute:—

1. "The notes are genuine; that is, I think I made them, but I am under the impression they were paid, but I don't think I am called

upon to have any further conversation with you about them": Grantham v. Powell, 6 U. C. Q. B. 494 (1849). § 59.

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2. "I am sorry to say I cannot do anything for you at present, but shall remember you as soon as possible": Gemmell v. Colton, 6 U. C. C. P. 57 (1856).

3. "If there is anything due plaintiff, I am willing to pay him": Keys v. Pollok, 1 N. S. (1 Thom.) 109 (1839).

4. A promise to pay "as soon as possible," without proof of defendant's ability: Murdoch v. Pitts, 2 N. S. (James) 258 (1854).

5. "I know that it is due, but I will never pay it": Wainman v. Kynman, 1 Ex. 118 (1847). See also Scales v. Jacob, 3 Bing. 638 (1826); Ayton v. Bolt, 4 ibid. 105 (1827); Fearn v. Lewis, 6 ibid. 349 (1830); Brigstocke v. Smith, 1 Cr. & M. 483 (1833); Spong v. Wright, 9 M. & W. 629 (1842).

6. "I never shall be able to pay cash, but you may have any of the goods we have at Y.": Cawley v. Furnell, 12 C. B. 291 (1851).

7. "As I do not recollect the date or the amount of the indorsements, I would thank you to send me a statement of them". Gibson v. Grosvenor, 4 Gray, (Mass.) 606 (1855).

The following have been held to be sufficient to take the case out of the statute:—

8. "I shall repeat my assurance of the certainty of your being repaid your generous loan": Collis v. Stack, 1 H. & N. 605 (1857).

9. "I hope to be in H. very soon, when I trust everything will be arranged with Mrs. W.": Edmonds v. Goater, 15 Beavan 415 (1852).

10. "The great kindness of your father in lending me the money to purchase my seat on the Stock Exchange places me now in your debt. I must leave it to your generosity whether you will have me liquidate the loan on the sale of my seat," where the seat had been sold: Buccleugh v. Eden, 5 T. L. R. 690 (1889).

11. "I suppose I shall have to pay in the end": Phelps v. Williamson, 26 Vt. 230 (1854).

12. "I supposed the note was paid by A.; and if he does not, I shall have to pay it": Hayden v. Johnson, ibid. 768 (1854).

The following cases further illustrate the various rules above laid down:—

13. Payments made by one of two joint and several makers will not take the case out of the statute, as against the other, unless made

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expressly as his agent and by his authority: Creighton v. Allen, 26 U. C. Q. B. 627 (1867).

14. A writing sufficient to take a note out of the statute enures to the benefit of a subsequent holder: Marshall v. Smith, 20 U. C. C. P. 356 (1870).

15. For conflicting decisions in Upper Canada as to prescription claimed under the Lower Canada Statute, see Hervey v. Pridham, 11 U. C. C. P. 329 (1861); King v. Glassford, ibid. 490 (1861); Shirif v. Holcomb, 2 E. & A. (U. C.) 516 (1864); Hervey v. Jacques, 20 U. C. Q. B. 366 (1861); Darling v. Hitchcock, 28 U. C. Q. B. 439 (1868).

16. The statute begins to run the day after the last day of grace: Edgar v. Magee, 1 O. R. 287 (1882); Ste. Marie v. Stone, 2 Dorion, 369; 5 L. N. 322 (1882).

17. The old rule in Lower Canada was, that a note payable on demand was due from the day of its date, and prescription ran from that time: Larocque v. Andres, 2 L. C. R. 335 (1851). Also under the Code: Brown v. Barden, Q. R. 13 S. C. 151 (1898); Bachand v. Lalumiere, Q. R. 21 S. C. 449 (1902).

18. The absence of the defendant from the country does not nterrupt prescription: Darah v Church, 14 L. C. R. 295 (1861).

19. A note made before a notary "en brevet" was held not to be a promissory note within the meaning of 12 V. c. 22, and C. S. L. C. c. 64, and not subject to the five years' prescription; Gravelle v. Beaudoin, 7 L. C. J. 289 (1863); Lacoste v. Chauvin, ibid. 339 (1863); Seguin v. Bergevin, 16 L. C. R. 415 (1865); Pigeon v. Dagenais, 17 L. C. J. 21 (1872). Crevier v. Sauriole, 6 L. C. J. 257 (1862), overruled. Under the Bills of Exchange Act, it was held to be subject to five years' prescription, like an ordinary note: Guimond v. Blanchard, Q. R. 21 S. C. 106 (1901); Robert v. Charbonneau, 8 R. J. 68 (1902). But this latter case was reversed in Review: Q. R. 21 S. C. 106, note.

20. The lex fori governs as to prescription: Hillsburgh v. Mayer, 18 L. C. J. 69 (1873); Cross v. Snow, 9 L. N. 196 (1886); Lafaille v. Lafaille, 14 R. L. 466 (1886); but held in a case governed by the law before the Code, that where defendant made a note in the United States which was payable there, and before its maturity he absconded and came to Lower Canada, and the holder did not learn his whereabouts until more than five years had passed, the five years' prescription did not apply under the rule, "contra non valentem agere non currit prescriptio": Wilson v. Demers, 14 L. C. J. 317 (1870).

21. Where the defendant had frequently written during the five years, asking for delay, prescription was held to have been interrupted: Walker v. Sweet, 21 L. C. J. 29 (1876).

22. A verbal promise to pay a note under $50 during the five years will interrupt prescription: Fuchs v. Legare, 3 Q. L. R. 11 (1876); but such a promise after the five years have expired will not revive a note: Fiset v. Fournier, 1 L. N. 589 (1878).

23. Where a bill is not accepted in payment of a debt, the prescription of the note does not prevent a recovery on the original debt if it is not prescribed: Bobitaille v. Denechaud, 5 Q. L. R. 238 (1879); Mitchell v. Holland, 16 S. C. Can. 687 (1889); Bouchard v. Behrer, 5 R. J. 263 (1898).

24. A conditional offer in writing which is not accepted, does not interrupt prescription; nor does the deposit of collaterals with the holder: McGreevy v. McGreevy, 17 Q. L. R. 278 (1891).

25. Dividends on a note paid by a curator in Quebec interrupt prescription as if the payment had been made by the debtor himself: Boulet v. Metayer, Q. R. 22 S. C. 289 (1902).

26. Payments on account by one partner take a note out of the statute as against his co-partner also: Sands v Keator, 5 N. B. (3 Kerr) 329 (1847); Vanwart v. Roberts, ibid. 572 (1847).

27. The action accrued to the plaintiff, an indorser, when the note was transferred to him, and this being more than six years after it was due, his absence beyond the seas was immaterial: Bradbury v. Baillie, 6 N. B. (1 Allen) 690 (1850).

28. Where a note is payable by instalments, each instalment is subject to a separate plea of prescription: Montgomery v. McNair, 7 N. B. (2 Allen) 31 (1850).

29. A bill is payable three months after date or sight. Time runs in favor of the acceptor from the day the bill is payable, not from the day the acceptance is given: Holmes v. Kerrison, 2 Taunt, 323 (1810).

30. A note payable on demand, dated Jan. 1, is not issued until July 1. Time runs in favor of the maker from July 1: Savage v. Aldren, 2 Stark, 232 (1817).

31. A note is payable three months after demand. Time runs in favor of the maker from the day it is payable: Thorpe v. Coombe, 8 D. & R. 347 (1826).

32. The consignee of goods authorizes the consignor to draw on him against them. The bill is dishonored and the drawer compelled

§ 69. to pay. Time runs against him on the implied contract of indemnity from the date of payment only: Huntley v. Sanderson, 1 Cr. & M. 467 (1833).

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33. A bill is accepted to accommodate the drawer. It is dishonored, and two years afterwards the acceptor has to pay it. Time runs in favor of the drawer only from the time the acceptor was compelled to pay and not from maturity: Reynolds v. Doyle, 1 M. & Gr. 753 (1840); in cases of contribution, see Davies v. Humphreys, 6 M. & W. 153 (1840).

34. A bill payable 90 days after sight is dishonored by non-acceptance. As regards the drawer, time runs against the holder from the dishonor and notice thereof. If the bill is presented for payment and again dishonored, no fresh cause of action arises: Whitehead v. Walker, 9 M. & W. 506 (1842).

35. A note is payable on demand, with no mention of interest. Proof that interest has been paid on it takes it out of the statute. Bamfield v. Tupper, 7 Ex. 27 (1851).

36. In 1840 a blank acceptance is given to a person who in 1850 fills it up as a bill payable three months after date and negotiates it to a bona fide holder. Time runs in favor of the acceptor only from the day the bill was payable: Montague v. Perkins, 22 L. J. C. P. 187 (1853).

37. Defendant asked plaintiff for a loan, no time for re-payment being fixed. The latter gave him a cheque, which was not cashed at once. In an action to recover the sum lent, time runs from the day the cheque was cashed, and not from its date: Garden v. Bruce, L. R. 3 C. P. 300 (1868).

38. The maker of a note twenty years after it was due, signed his name and the date on the back of the note. Held, a sufficient acknowledgment to take it out of the statute: Bourdin v. Greenwood, L. R. 13 Eq. 281 (1871).

39. To take a case out of the statute there must be an acknowledgment of the debt from which a promise to pay is implied; or an unconditional promise to pay; or a conditional promise, and proof of the fulfilment of the condition: Re River Steamer Co., L. R. 6 Ch. at p. 828 (1871); Green v. Humphreys, 36 Ch. D. at p. 479 (1884).

40. Where part payment is relied upon as an acknowledgment, it must be under such circumstances that a promise to pay may be inferred in fact, not merely implied in law: Morgan v. Rowlands, L. R. 7 Q. B. at p. 498 (1872).

41. A note dated in 1857 was made payable three months after demand with no mention of interest. Interest was paid in 1857 and 1858, and indorsed on the note. The maker died in 1869, and the payee in 1878, being still the holder. On a claim by the executor of the payee, held, that time ran from the first payment of interest, and independent of the statute it would be presumed to be paid: Re Rutherford, 14 Ch. D. 687 (1880).

42. Where a demand note was given and dated July 24th for a loan, but the money was not paid to the maker until September 8th, the statute (probably) runs from July 24th: Buccleugh v. Eden, 5 T. L. R. 690 (1889).

43. After the indorsement of a note the maker made a payment to the payee, who had no right to receive the money. Held, that this did not take the case out of the statute: Stamford Banking Co. v. Smith, [1892] 1 Q. B. 765.

2. Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser, it is not discharged; but— *Payment by drawer or indorser; its effect.*

(*a*) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill; *Payment by drawer.*

(*b*) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill: Imp. Act, s. 59 (2) (*a*) (*b*). *Payment by indorser.*

The provisions to which this sub-section is subject are those relating to accommodation bills in sub-section 3.

If the indorser, who has paid a bill, desires to negotiate the bill again, he must strike out his own and subsequent indorsements, and if indorsed to him in full he must re-indorse it.

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Payment of bill.

The present section contemplates payment at or after maturity; where a bill before maturity is negotiated back to the drawer or an indorser, he may re-issue it, but cannot enforce the bill against any intervening party to whom he was previously liable: section 37.

If several persons indorse a bill or note for the accommodation of the acceptor or maker, and one of them pays it, the whole circumstances attendant upon its making, issue and transference, may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, and reasonable inferences from these facts and circumstances are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law merchant would otherwise assign to them. Where several directors mutually agreed to become joint sureties for the company, and in pursuance thereof indorsed notes made by the company, they were entitled and liable to equal contributions among themselves: Macdonald v. Whitfield, 8 App. Cas. 733 (1883).

Where an action against the indorser of a note was dismissed on the ground that he had indorsed for the accommodation of the plaintiffs, this was held to be an answer to an action seeking to hold him responsible as a partner by estoppel in the firm which made the note: Ray v. Isbister, 22 Ont. A. R. 12 (1895). Affirmed in the Supreme Court: Isbester v. Ray, 26 S. C. Can. 79 (1896).

ILLUSTRATIONS.

1. The indorser who pays a note at maturity may at once proceed against the prior parties who are liable to him: Latham v. Norton, 6 U.C. O. S. 82 (1841); McNab v. Wagstaff, 5 U. C. Q. B. 588 (1849).

2. The drawer drew a bill to his own order and specially indorsed it. After dishonor it came back into his hands; he struck out the special indorsement, and indorsed it to the plaintiff who was held entitled to recover from the acceptor: Black v. Strickland, 3 O. R. 217 (1883); Callow v. Lawrence, 3 M. & S. 95 (1814); Hubbard v. Jackson, 4 Bing. 390 (1827).

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3. An indorser who pays is not entitled to and does not need conventional subrogation against prior parties: Bove v. McDonald, 16 L. C. R. 191 (1865).

4. Payment of a bill by the drawer does not discharge the bill or free the acceptor: Goodall v. Exchange Bank, M. L. R. 3 Q. B. 430 (1887).

5. Where two persons indorse a note for the accommodation of the maker, and the last indorser pays it, he is entitled to recover only one-half the amount from the prior indorser: Vallee v. Talbot, Q. R. 1 S. C. 223 (1892).

6. An indorser who pays a note where there was neither protest nor waiver of protest has no recourse against prior indorsers: Savaria v. Paquette, Q. R. 20 S. C. 314 (1899).

7. The indorser of a bill writes to the drawer of a bill, promising to "retire" it, and accordingly takes it up before maturity. It is not discharged: Elsam v. Denny, 15 C. B. at p. 94 (1854).

8. The drawer or indorser of a bill who pays, is a quasi-surety for the acceptor, and as such is entitled to the benefit of any securities deposited with the holder by the acceptor: Duncan v. N. & S. Wales Bank, 6 App. Cas. 1 (1880). The indorser of a promissory note has the same rights: Aga Ahmed Ispahany v. Crisp, 8 T. L. R. 132 (1891).

3. Where an accommodation bill is paid in due course by the party accommodated, the bill is discharged. Imp. Act, s. 59 (3). Accommodation bill

An accommodation bill is one which the drawee has accepted for the accommodation of the drawer or some other person. The person thus accommodated may or may not be a party to the bill. For a definition of an accommodation party and his liabilities, see section 28.

The principle on which the bill is discharged is, that it has been paid by the person who is in reality primarily liable for the debt; and having no rights against any person, he could not by a transfer after maturity give any rights to another holder: Solomon v. Davis, 1 C. & E. 83 (1883).

§ 60. If the bill was for the accommodation of several parties, and it is paid by one of them, the bill is discharged but the party who has paid has his recourse against the others.

ILLUSTRATIONS.

1. Where a bill was accepted for the accommodation of a third party and discounted, its payment by the drawer does not relieve the acceptor: Dill v. Wheatley, 34 N. S. 526 (1901).

2. Where the payee for whose accommodation the bill was made pays it after maturity, the bill is discharged: Watson v. Porter, 5 N. B. (3 Kerr) 137 (1846).

3. Plaintiff took a bill of sale of A.'s goods, undertaking to pay his borrowed money and accommodation notes. The note sued on was made by defendant for A.'s accommodation and indorsed by him and discounted in a bank. Plaintiff paid it at maturity and sued the maker. Held, that although plaintiff did not know it was an accommodation note, it was discharged on his paying it for A. and his action was dismissed: Peters v. Waterbury, 24 N. B. 154 (1884).

4. A bill is accepted for the accommodation of the drawer. He negotiates it, and at maturity takes it up. Subsequently he re-issues it. The holder cannot sue the acceptor, for the bill was discharged when the drawer paid it: Cook v. Lister, 13 C. B. N. S. at p. 591 (1863). See also Lazarus v. Cowie, 3 Q. B. 459 (1842); Ralli v. Dennistoun, 6 Ex. 483 (1851); Parr v. Jewell, 16 C. B. at p. 709 (1855); Strong v Foster, 17 C. B. at p. 222 (1855); Meakins v. Martin, Q. R. 8 S. C. 522 (1895).

Acceptor the holder at maturity.

60. When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged. Imp. Act, s. 61.

If the person who has accepted a bill in his own name at maturity, is the holder in his capacity of executor, administrator, trustee, assignee, tutor, curator, or the like, the bill is not discharged. In this section "in his own right" is not used in contradistinction to a right in a representative capacity, but indicates a right not subject to that of another person, and good against all the world: Nash v. DeFreville, [1900] 2 K. B. 72.

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If the acceptor becomes the holder of the bill before its maturity it is not discharged, but he may re-issue and further negotiate it; but he is not entitled to enforce payment of it against any intervening party to whom he was previously liable: section 37. When a bill is discharged, all rights of action on it are extinguished; it ceases to be a bill.

At common law if the acceptor or maker became the administrator of the holder, the bill or note was not discharged, but if he became the executor of the holder it was discharged, though he had to account for the amount of it as assets: Freakley v. Fox, 9 B. & C. 130 (1829). The discharge of the bill freed the indorsers: Jenkins v. McKenzie, 6 U. C. Q. B. 544 (1849); Lowe v. Peskett, 16 C. B. 500 (1855).

Confusion.

The principle of this section is what is known in the civil law as "confusion." The law of Quebec on the subject is contained in the following Articles of the Civil Code:—"1198. When the qualities of creditor and debtor are united in the same person, there arises a confusion which extinguishes the obligation.—1199. The confusion which takes place by the concurrence of the qualities of creditor and principal debtor in the same person avails the sureties." It only takes place when the person is both creditor and debtor personally, in his own right, when he is both debtor and creditor in the same capacity or quality.

If a bill, accepted by two or more joint acceptors, is held by one of them at or after maturity, it is discharged; but such acceptor does not thereby lose his recourse or right of contribution against his co-acceptors: Harmer v. Steele, 4 Ex. 1 (1849). See Neale v. Turton, 4 Bing. at p. 151 (1827).

Express waiver as against acceptor.

61. When the holder of a bill at or after maturity, absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged: the renunciation must be in writing, unless the bill is delivered up to the acceptor: Imp. Act, s. 62 (1).

§ 61.

A bill or note payable on demand is "at maturity" immediately on its being made, and the holder in desiring to renounce all rights in it, when delivering it to any person other than the acceptor, must make his renunciation in writing: Edwards v. Walters, [1896] 2 Ch. 157.

The principle of this section in allowing a bill to be discharged by accord alone, without satisfaction, is contrary to the ordinary rule of the common law with respect to contracts. It was embodied in the law merchant from the civil law. In French law it is called "remise": Pothier, Change, No. 176; Nouguier, §§ 1043-1052.

In England an express renunciation by parol was formerly sufficient: Dingwall v. Dunster, 1 Dougl. 247 (1779), Whatley v. Tricker, 1 Camp. 35 (1807); Foster v. Dawber, 6 Ex. at p. 851 (1851). The clause making a writing necessary was inserted in the Imperial Act from the Scotch law.

Discharge by partial payment.

Where there is a payment of a sum less than the amount of the bill, the bill may, in Quebec, Ontario and Manitoba, be discharged under the provisions of the present section; or, it may be considered as discharged by payment under section 59. This was always the rule of the civil law; and it has been in effect adopted in Ontario by R. S. O. c. 51, s. 58, s-s. 8, and in Manitoba by R. S. M. c. 40, s. 39 (*e*), which altered the rule of the common law as to accord and satisfaction, and provides that "part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation." In any of the other provinces where the common law rule is still in force, part payment would only operate as a discharge when the conditions of the present section are complied with.

Defendant gave P. his promissory notes which P. discounted with plaintiffs. Defendant paid P., who gave plaintiffs his cheque and got the notes, which he sent to defendant who destroyed them. The cheque was dishonored. Held,

that the notes were not discharged: Nash v. DeFreville, [1900] 2 Q. B. 72. § 61.

The bill is discharged only when the renunciation by the acceptor is at or after maturity, and when it is absolute and unconditional: See Re George, Francis v. Bruce, 44 Ch. D. 627 (1890). For the consideration of the questions that may arise, where the holder reserves his rights against other parties to the bill, see the notes on the following sub-section.

Where a plaintiff's title to a note has been obtained not by indorsement or delivery, but by assignment without indorsement, this section does not apply; and the maker is entitled to prove the discharge by the ordinary rules of evidence: Clonbrook v. Browne, Q. R. 18 S. C. 575 (1900).

Discharge of party by waiver.

2. The liabilities of any party to a bill may in like manner be renounced by the holder before, at or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of renunciation. Imp. Act, s. 62 (2).

"In like manner," that is, absolutely and unconditionally; and in writing, unless the bill is delivered up.

If the acceptor or any other party to a bill is discharged by the holder before maturity, and no entry be made of it upon the bill, and it come into the hands of a bona fide holder for value before maturity without notice, the party so released would be liable to him.

Where the parties to a bill stand in the relation of principal and surety to each other, the nature of the renunciation of his rights by the holder against the party who stands in the relation of principal to other parties, becomes a matter of great importance. The question arises most frequently in connection with composition and discharge, or the granting of time by taking a renewal.

At common law where parties to a bill stand in the relation of principal and surety to each other, if the holder,

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At common law

being aware of the fact, grants a discharge to the principal debtor or gives him time, the sureties are discharged, unless the holder has expressly reserved his rights against the sureties, or has reserved their rights against the principal debtor. Oakley v. Pasheller, 4 Cl. & F. 207 (1836); Owen v. Homan. 4 H. L. Cas. 997 (1853); Oriental Corporation v. Overend, L. R. 7 Ch. 142 (1871); Polak v. Everett, 1 Q. B. D. at p. 673 (1876); Munster and Leinster Bank v. France. 24 Ir. L. R. 82 (1889); Thurgar v. Travis, 7 N. B. (2 Allen), 272 (1851); Holliday v. Jackson, 22 S. C. Can. 479 (1894); Demers v. Dumas, 3 R. J. 70 (1896).

On this subject, Chalmers says, p. 222: "For the present purpose, prima facie the acceptor of a bill is the principal debtor, and the drawer and indorsers are, as regards him, sureties. and the drawer of a bill is the principal as regards the indorsers. and the first indorser is the principal as regards the second and subsequent indorsers, and so on in order;—but evidence for the present purpose is admissible to show the real relationship of the parties, and it is immaterial that the holder was ignorant of the relationship when he took the bill, provided he had notice thereof at the time of his dealings with the principal": Ewin v. Lancaster. 6 B. & S. at p. 577 (1865); Oriental Corporation v. Overend, L. R. 7 H. L. 348 (1874). The rule is the same if one who was originally a principal debtor becomes a surety, and the creditor has had notice of the change: Rouse v. Bradford Banking Co., [1894] A. C. 586.

It was formerly held that an acceptor could not be shown to be a mere surety, as this would be contradicting the written instrument by parol: Fentum v. Pocock, 5 Taunt. 192 (1813). But now all the attendant facts and circumstances may be referred to. for the purpose of ascertaining the true relation of the parties to each other: Macdonald v. Whitfield. 8 App. Cas. at pp. 745, 748 (1883).

Suretyship in Quebec.

In Quebec suretyship becomes extinct by the same causes as other obligations: C. C. Art. 1956. For these, see p. 317, ante. The discharge of the principal debtor discharges the

surety: C. C. Art. 1958; but delay given to the principal debtor does not discharge the surety, who may in case of such delay sue the debtor in order to compel him to pay: C. C. Art. 1961. § 61.

The suretyship is also at an end when by the act of the creditor the surety can no longer be subrogated in the rights, hypothecs, and privileges of such creditor: C. C. Art. 1959.

As will be seen from the cases cited, the decisions in the Quebec Courts have been conflicting, and where a party to a bill occupying the relation of a surety has been released by the mere giving of time, notwithstanding Article 1961 of the Code, it is not usually clear from the report whether this is on account of there having been a novation, or on account of the provision making the law of England as to bills and notes applicable, where the law of the province or the Code has no express provision.

As to the effect of the conflict between the law of Quebec and that of other provinces, see notes on section 71, and on section 8 of the amending Act of 1891.

ILLUSTRATIONS.

1. Time given to the maker of a note, discharges an indorser: Vankoughnet v. Mills, 5 Grant, 653 (1856); Arthur v. Lier, 8 U. C. C. P. 180 (1858); Farrell v. Oshawa Mfg. Co., 9 U. C. C. P. 239 (1859); Bedell v. Eaton, 4 N. B. (2 Kerr) 217 (1843).

2. The holder of a note gave time to two makers who were the principal debtors, without the consent of a third maker who was surety for them. The latter was held not liable to a plaintiff who received the note after maturity with notice: Perley v. Loney, 17 U. C. Q. B. 279 (1858); Shepley v. Hurd, 3 Ont. A. R. 549 (1879); Davidson v. Bartlett, 1 U. C. Q. B. 50 (1844), overruled; Greenough v. McClelland, 2 El. & El. 424 (1860).

3. Mere delay, or indulgence, or even negligence, is not enough where there is no binding agreement to give time: Thompson v. McDonald, 17 U. C. Q. B. 304 (1858); Wilson v. Brown, 6 Ont. A. R. 87 (1881); Berthelot v. Aylwin, 2 Rev. de Leg. 31 (1819); Merchants' Bank v. Whitfield, 2 Dorion, 157 (1881); Philpot v. Briant, 4 Bing. 717 (1828); Goring v. Edmonds, 6 Bing. at p. 99 (1829); Black v. Ottoman Bank, 15 Moore P. C. at p. 484 (1862); Carter v. White, 25 Ch. D. at p 672 (1883); Hay v. Powrie, 13 Sess. Cas. 777 (1886); Greig v. Taylor, 15 V. L. R. 86 (1889).

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Discharge by waiver.

4. A reserve of the rights of the holder against the parties who apparently occupy the relation of sureties, prevents a discharge of the latter: Bank of Upper Canada v. Jardine, 9 U. C. C. P. 332 (1859); Canadian Bank of Commerce v. Northwood, 14 O. R. 207 (1887); Muir v. Crawford, L. R. 2 Sc. App. 456 (1875).

5. When the holders of a note gave time to an indorser, knowing that the maker had signed the note for his accommodation, the maker was discharged: Bank of Upper Canada v. Ockermann, 15 U. C. C. P. 363 (1865); Leet v. Blumenthal, Q. R. 13 S. C. 250 (1898); Ex parte Webster, De Gex, 414 (1847); Bailey v. Edwards, 4 B. & S. 761 (1864).

6. A mother gave her son a note for his accommodation. The holder, who was aware of the facts, took two renewal notes from the son without the mother's knowledge. Held, that she was released: Devanney v. Brownlee, 8 Ont. A. R. 355 (1883). See Healey v. Dolson, 8 O. R. 691 (1885).

7. Where a bank gave up notes to a principal debtor and took forged renewals in their place, the surety was released: Merchants' Bank v. McKay, 15 S. C. Can. 672 (1888).

8. An indorsement of the payment of interest on a note up to a date beyond, is evidence of an extension of time of payment to such date, and discharges a surety: Ryan v. McKerrall, 15 O. R. 460 (1888).

9. Two partners gave a creditor a joint and several note, and a mortgage on firm property. The firm dissolved, one partner taking the assets and assuming the liabilities. The creditor discharged the mortgage without getting payment, and afterwards sued the other partner on the note. Held, that he could not recover: Allison v. McDonald, 23 S. C. Can. 635 (1894).

10. The acceptance, in renewal of a promissory note, some of the makers of which are sureties to the knowledge of the holder of a promissory note not signed by one surety, discharges the co-sureties: Banque Provinciale v. Arnoldi, 2 O. L. R. 624 (1901).

11. Delay granted to the maker of a note does not liberate the indorser: Massue v. Crebassa, 7 L. C. J. 211 (1863); Meikle v. Dorion, Q. R. 1 S. C. 72 (1892); Guy v. Pare, ibid. 443 (1892). Contra, St. Aubin v. Fortin, 3 Rev. de Leg. 293 (1845); Desrosiers v. Guerin, 21 L. C. J. 96 (1876); Carslake v. Wyatt, 2 Stephens' Dig. 112 (1877); Banque Ville Marie v. Mallette, 33 L. C. J. 8 (1888); Pelletier v. Brosseau, M. L. R. 6 S. C. 331 (1890).

12. Where the holder accepted a composition from and released an indorser for whose accommodation the note was made, not

knowing that it was for his accommodation, the maker is not discharged: Banque Nationale v. Betournay, 18 R. L. 175 (1887). § 62.

13. A creditor took from a debtor a sight bill accepted by a third party and instead of collecting it, took a renewal. The acceptor failed before the renewal matured. Held, that the original debtor was discharged: O'Brien v. Semple, M. L. R. 3 Q. B. 55 (1887).

14. An indorser was released before maturity by the bank which held the note at maturity. Held, that the plaintiff who took it when overdue, cannot recover from the indorser: McLeod v. Carman, 12 N. B. (1 Han.) 592 (1860).

15. Plaintiffs held as collateral a note indorsed by one of defendants for the accommodation of the makers, who were plaintiffs' debtors. Plaintiffs renewed the note, to which the indorsed note was collateral. This relieved the indorser: Le Jeune v. Sparrow, 1 Terr. L. R. 384 (1893).

16. Taking a renewal bill payable on demand, is a giving of time as well as one payable at a fixed future time: Currie v. Misa, L. R. 10 Ex. at pp. 163, 164 (1875).

17. When two or more sureties contract severally, the creditor by releasing one does not discharge the others; but when the creditor releases one of two or more sureties who have contracted jointly and severally, the others are discharged, the joint suretyship of the others being part of the consideration of the contract of each: Ward v. National Bank of New Zealand, 8 App. Cas. at p. 764 (1883).

18. The discharge of one of two makers of a joint and several promissory note on part payment, does not discharge the other from his liability for the balance: Stephens v. Hughes, 1 T. L. R. 415 (1885).

19. "An absolute discharge given to the acceptor discharges him from all liability on the bill. But a discharge with the reservation of the rights of the sureties, the indorsers, only discharges the acceptor from his liability to the person giving the discharge": per Lopes, L. J. in Jones v. Whittaker, 3 T. L. R. 723 (1887).

62. Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged: *Cancellation of bill.*

2. In like manner, any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such *Of any signature.*

§ 62. case any indorser who would have had a right of recourse against the party whose signature is cancelled is also discharged: Imp. Act, s. 63 (1) (2).

As to striking out indorsements, see ante p. 211, and section 59, s-s. 2 (b). Prior parties are not released by the cancellation of a signature: Barthe v. Armstrong, 5 R. L. 213 (1869); Biggs v. Wood, 2 Man. 272 (1885).

When a bill, produced at the trial, has the defendant's signature erased, the plaintiff cannot recover without evidence that it was done by mistake: Peel v. Kingsmill, 7 U. C. Q. B. 364 (1850); Isaacs v. Grothe, 29 N. B. 420 (1890); Knight v. Clements, 8 A. & E. 215 (1838); Clifford v. Parker, 2 M. & Gr. 909 (1841).

For a discussion of the principle of the section, see Scholey v. Ramsbottom, 2 Camp. 485 (1810); Ralli v. Dennistoun, 6 Ex. 483 (1851); Ingham v. Primrose, 7 C. B. N. S. 82 (1859); Yglesias v. River Plate Bank, 3 C. P. D. 60 (1877).

Erroneous cancellation.

3. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority. Imp. Act, s. 63 (3).

The usage in London in such a case is to return the bill with the words "Cancelled by mistake" written upon it: Byles, p. 268.

If a banker cancel a bill by mistake, without any want of due care, he does not incur any liability; but if there is negligence, and any loss result therefrom, he may be held liable: Novelli v. Rossi, 2 B. & Ad. 757 (1831); Warwick v. Rogers, 5 M. & Gr. 340, 373 (1843); Prince v. Oriental

Bank, 3 App. Cas. 325 (1878): Bank of Scotland v. Dominion Bank, Toronto, [1891] A. C. 592. See also Raper v. Birkbeck, 15 East, 17 (1812); Wilkinson v. Johnson, 3 B. & C. 428 (1824).

Alteration of bill.

63. Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is voided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers:

Proviso.

Provided, that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor: Imp. Act, s. 64 (1).

The first clause is in accordance with the old law. Subsequent indorsers are held liable because an indorser is estopped from denying the prior signatures, and that it is a valid bill: section 55, s-s 2.

It has been laid down that an alteration is material which in any way alters the operation of the bill and the liabilities of the parties, whether the change be prejudicial or beneficial, or which would alter its effect if used for business purposes: Gardner v. Walsh, 5 E. & B. at p. 89 (1855), Suffell v. Bank of England, 9 Q. B. D. at pp. 568, 574 (1882). Whether an alteration is material or not, is a question of law: Re Commercial Bank, 10 Man. 174 (1894), Vance v. Lowther, 1 Ex. D. 176 (1876).

The alteration need not be in the body of the bill or note. Adding in the corner "Interest at 6 per cent." is a material alteration, as it is part of the contract which is to be collected from all within the four corners of the instrument. It is not the same as a memo. of the place of payment in the corner, which by mercantile usage may be in-

§ 63. serted for convenience: Warrington v. Early, 2 E. & B. 763 (1853).

Alteration of bill.

The proviso was inserted in the English bill in committee, and is intended to modify the rigor of the common law, which voided the bill entirely, even in the hands of an innocent holder. For a definition of a holder in due course, see section 29.

ILLUSTRATIONS.

1. Defendant indorsed a note for the accommodation of the makers. They afterwards inserted the words "with interest at 10 per cent." without his knowledge. He was held not liable on the note to a bona fide holder for value: Halcrow v. Kelly, 28 U. C. C. P. 551 (1878).

2. Where indorsers subsequently assented to the addition of the words "with interest at 7 per cent." they were held liable: Fitch v. Kelly, 44 U. C. Q. B. 578 (1879).

3. Where a note was payable to P or bearer, and after being negotiated, the name P. was written, but not by him, below the signature of the makers, and without their knowledge, the note was held to be void: Reid v. Humphrey, 6 Ont. A. R. 403 (1881).

4. Two notes were given for patent rights, and the maker indorsed on them the words "the within notes not to be sold." The payee cut from one note the portion with these words, but without defacing it. On the other he erased the word "not." Plaintiff noticed the erasure when buying the notes, and gave much less than their value for them. Held, that he was not an innocent holder and the notes were void: Swaisland v. Davidson, 3 O. R. 320 (1882).

5. Two persons signed a promissory note commencing "I promise to pay to bearer." It was discounted by plaintiff for the holder, on the latter agreeing to become responsible for the note, and signing below the makers. It was held that he was not an indorser, but was liable as a surety, and that the note was not voided as against any of the parties: Kinnard v. Tewsley, 27 O. R. 398 (1896); Mersman v. Werges, 112 U. S. 139 (1884) approved.

6. Where the name of one of the makers of a note was not signed by him or with his authority, and this not being apparent, the plaintiff as a holder for value was held entitled to recover as if this name had never been on the note: Cunnington v. Peterson, 29 O. R. 346 (1898).

7. A note is voided by the insertion of the words "jointly and severally," even although the holder erases the words before the objecting makers become aware of the change: Banque Provinciale v. Arnoldi, 2 O. L. R. 624 (1901). 63

8. The words "Extended to Nov. 28, '02" written by the secretary of the plaintiff company on the corner of a note, and not assented to by defendants, will void the note: Mutual Life v. McLaughlin, 38 C. L. J. 630 (1903). Contra, Drexler v. Smith, 30 Fed. R. 754 (1887).

9. A cheque for $5 was accepted by the Bank of Hamilton, then raised by the drawer to $500, and deposited with the Imperial Bank which passed it through the clearing house, and the next day it was paid by the Bank of Hamilton. The following morning the Bank of Hamilton discovered the forgery and claimed $495 from the Imperial Bank. Held, in all the Courts, that it was entitled to recover: Imperial Bank v. Bank of Hamilton, [1903] A. C. 49.

10. When the maker of a note signed it with a blank before the sum, both in the body of the note and in the margin, and the amount was increased, he was, on the ground of negligence, held liable to an innocent holder for the larger sum: Dorwin v. Thomson, 13 L. C. J. 262 (1869); Young v. Grote, 4 Bing. 253 (1827); Marcussen v. Birkbeck Bank, 5 T. L. R. 646 (1889).

11. The question of the alteration of a note is for the jury: Lomville v. Davies, 13 N. S. (1 R. & G.) 159 (1879); Street v. Walsh, Stevens' N. B. Dig. 250 (1862).

12. Where a renewal note was altered by inserting the words "jointly and severally," it was rendered void; but plaintiffs recovered the balance due on the original note which was also declared on: People's Bank v. Wharton, 27 N. S. 67 (1894).

13. The rule in the proviso was applied in favor of plaintiffs when after the note was signed the words "jointly and severally" had been inserted in the same handwriting as the rest of the body of the note: Waterous Engine Co. v. McLean, 2 Man. 279 (1885).

14. Where a bill is voided on account of a material alteration, the holder cannot sue on the consideration, unless the alteration took place before the bill was negotiated to him, or he is innocent in the matter, and the person from whom he received it, had no remedy over on the bill: Alderson v. Langdale, 3 B. & Ad. 660 (1832); Burchfield v. Moore, 3 E. & B. 683 (1854); Atkinson v. Hawdon, 2 A. & E. 628 (1835).

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15. The alteration may be "apparent" although the holder may not have been able to detect it: Leeds Bank v. Walker, 11 Q. B. D. 84 (1883). But see Cunnington v. Peterson, 29 O. R. at p. 349 (1898).

16. A bill for £500 was after acceptance altered by the drawer to £3,500. The stamp was sufficient to cover the larger amount, and the bill when accepted had spaces where the words and figures necessary for the alterations were written in. In an action by a holder for value against the acceptor, it was held that the latter was not estopped from setting up the true facts, and was only liable for £500: Scholfield v. Londesborough, [1896] A. C. 514.

17. A bill was materially altered by the son of the acceptor. The next day the acceptor gave her son full authority to draw, accept, etc., for her. Held, that the bill was voided by the alteration: Sutton v. Blakey, 13 T. L. R. 441 (1897).

18. Except in the case of banker and customer, there is no duty on the part of the drawer or maker of a negotiable instrument to use care in framing it so as, as far as possible, to prevent fraudulent interpolation or alteration, and failure to use such care will not prevent him from setting up the defence that the instrument has been avoided as against him by material alteration without his consent. A finding by the jury that but for the plaintiff's want of care he would have seen that the bill in question had been altered, negatived the proviso of this section and was equivalent to a finding that the alteration was apparent: Brown v. Bennett; Colonial Bank v. Bennett, 9 N. Z. L. R. 487 (1891).

What are material alterations.

2. In particular, the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent. Imp. Act, s. 64 (2).

ILLUSTRATIONS.

The following alterations in bills and notes have been held to be material:—

1. Alteration of the date: Meredith v. Culver, 5 U. C. Q. B. 218 (1848); Gladstone v. Dew, 9 U. C. C. P. 439 (1859); Beltz v. Molsons Bank, 40 U. C. Q. B. 253 (1876); Banque Ville Marie v. Primeau, 26 L. C. J. 20 (1881); Quebec Bank v. Ogilvy, 3 Dorion, 200 (1883);

Masten v. Miller, 4 T. R. 320 (1791); Outhwaite v. Luntley, 4 Camp. 179 (1815); Atkinson v. Hawdon, 2 A. & E. 628 (1835); Hirschman v. Budd, L. R. 8 Ex. 171 (1873); Vance v. Lowther, 1 Ex. D. 176 (1876); Engel v. Stourton 5 T. L. R. 444 (1889). Even although it be by changing the date of a demand note, payable with interest, to a later date and so benefits the maker by reducing the amount of interest chargeable to him: Boulton v. Langmuir, 24 Ont. A. R. 618 (1897).

2. Alteration of the sum payable: Halcrow v. Kelly, 28 U. C. C. P. 551 (1878); Fitch v. Kelly, 44 U. C. Q. B. 578 (1879). Even if made less; Hamelin v. Bruck, 9 Q. B. 306 (1846); Sutton v. Toomer, 7 B. & C. 416 (1827); Warrington v. Early, 2 E. & B. 763 (1853).

3. Alteration of the time of payment: Meredith v. Culver, supra; Reg. v. Craig, 7 U. C. C. P. 239 (1857); Westloh v. Brown, 43 U. C. Q. B. 402 (1878); Long v. Moore, 3 Esp. 155 n. (1790).

4. Alteration of the place of payment: McQueen v. McIntyre, 30 U. C. C. P. 426 (1879); Tidmarsh v. Grover, 1 M. & S. 735 (1813); Cowie v. Halsall, 4 B. & Ald. 197 (1821).

5. Adding a place of payment: Calvert v. Baker, 4 M. & W. 417 (1838): Gibb v. Mather, 2 Cr. & J. at p. 262 (1832).

6. Making a "joint" note "joint and several": Samson v. Yager, 4 U. C. O. S. 3 (1834); Banque Provinciale v. Arnoldi, 2 O. L. R. 624 (1901); People's Bank v. Wharton, 27 N. S. 67 (1894); Perring v. Hone, 4 Bing. 28 (1826). See Leslie v. Emmons, 25 U. C. Q. B. 243 (1866).

7. By striking out or clipping off a condition indorsed: Campbell v. McKinnon, 18 U. C. Q. B. 612 (1859); Swaisland v. Davidson, 3 O. R. 320 (1883).

8. By adding "or order" to make the note negotiable: Lawton v. Millidge, 4 N. B. (2 Kerr) 520 (1844). But see No. 19 below.

9. By adding a new maker after issue: Reid v. Humphrey, 6 Ont. A. R. 403 (1881); Carrique v. Beaty, 24 Ont. A. R. 302 (1897); Gardner v. Walsh, 5 E. & B. 83 (1855); Browning v. Gosnell, (Iowa) 59 N. W. R. 340 (1894). Contra, Kinnard v. Tewsley, 27 O. R. 398 (1896); Mersman v. Werges, 112 U. S. 139 (1884) approved.

10. Striking out without the consent of the makers a memorandum on the back of a note that it was to be renewed: Fulton v. McCardle, 6 N. Z. L. R. 365 (1888).

11. Erasing the signature of one of two joint makers: Nicholson v. Revill, 4 A. & E. 675 (1836).

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Discharge by alteration.

12. Cutting off the signatures of one of several joint makers: Mason v. Bradley, 11 M. & W. 590 (1843).

13. Filling up a blank with an incorrect date: Harrison v. Cotgreave, 4 C. B. 562 (1847).

14. Altering the numbers of Bank of England notes: Suffell v. Bank of England, 9 Q. B. D. 535 (1882).

15. Changing "I" to "we": Draper v. Wood, 112 Mass. 315 (1873).

16. Changing "order" to "bearer": Re Commercial Bank, 10 Man. 171 (1894); Booth v. Powers, 56 N. Y. 22 (1874).

17. Where a note was payable with interest, adding "after maturity": Coburn v. Webb, 56 Ind. 100 (1877).

The following alterations have been held not to be material:—

1. Changing the date of a note from 1886 to 1896, where the former figures were written by inadvertence for the latter: McLaren v. Miller, 36 C. L. J. 680 (1900).

2. Inserting the word "months" where inadvertently omitted: Laine v. Clarke, 3 Rev. de Leg. 434 (1816).

3. As regards the maker, giving the note a later date: Canadian Investment Co. v. Brown, 19 R. L. 364 (1890); but now see sub-section 2, supra.

4. Writing the words "pour aval" over the signature of the first indorser, when he had in fact indorsed the note above the payee, and as an "aval": Abbott v. Wurtele, Q. R. 6 S. C. 204 (1894).

5. The maker of an accommodation note issued in June, dated it "6th, 1875," without a month. June 6th was a Sunday. The payee made the date June 8th. Held, that the note was not voided: Merchants' Bank v. Stirling, 13 N. S. (1 R. & G.) 439 (1880); but now see sub-section 2, supra.

6. A memorandum at the foot declaring the note to be payable at a particular place: Cunard v. Tozer, 4 N. B. (2 Kerr) 365 (1844).

7. Adding "or order": Kershaw v. Cox, 3 Esp. 246 (1800); Byrom v. Thompson, 11 A. & E. 31 (1839).

8. Changing the name of the drawees from S. C. & Co. to S. & C., their proper firm name: Farquhar v. Southey, 1 M. & M. 14 (1826).

9. Adding "on demand," where no due time was mentioned: Aldous v. Cornwell, L. R. 3 Q. B. 573 (1868).

10. Inserting the word "pay" where inadvertently omitted: Maclean v. McEwen, 1 Rettie (5th series), 381 (1899). § 64.

11. Adding "for the Bank of, etc." to the signature of the cashier when he had in fact signed for the bank: Folger v. Chase, 18 Pick. (Mass.) 63 (1836).

12. Inserting the dollar mark before the numerals: Houghton v. Francis, 29 Ill. 244 (1862).

13. Correcting a name incorrectly written: Cole v. Hills, 44 N. H. 227 (1863); Derby v. Thrall, 44 Vt. 413 (1872).

14. Retracing a faded name in clear ink: U. S. Nat. Bank v Nat. Park Bank, 59 Hun, 495 (1891).

Fraudulently altering a bill or note is forgery. See ante p. 139, and the Criminal Code, 1892, section 422, which defines forgery as the making of a false document. Sub-section 2 of the same section declares that "making a false document includes altering a genuine document in any material part, and making any material addition to it, or adding to it any false date, attestation, seal or other thing which is material, or by making any material alteration in it, either by erasure, obliteration, removal or otherwise."

Acceptance and Payment for Honor.

Sections 64 to 67, inclusive, relate to this peculiar form of acceptance and payment, called also supra protest, because it can only take place after the bill has been protested for non-acceptance or non-payment as the case may be. In the French Code de Commerce it is called acceptance or payment by intervention. On account of the great facilities which parties to a bill now have for communicating with each other, it is seldom resorted to in the course of modern mercantile affairs.

64. Where a bill of exchange has been protested for dishonor by non-acceptance, or protested for better security, and is not overdue, any person not being a party already liable thereon, may, with the

Acceptance for honor supra protest

§ 64. consent of the holder, intervene and accept the bill supra protest, for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn. Imp. Act, s. 65 (1); C. C. 2296.

Acceptance for honor.

It is not necessary that the protest should be extended before acceptance supra protest; it is sufficient that the bill has been noted: section 92.

As to protest for better security when the acceptor has failed, see section 51, s-s. 5 and Ex parte Wackerbath, 5 Vesey, 574 (1800).

The holder may refuse to allow an acceptance supra protest; he may prefer an immediate recourse against the parties liable to him on the bill. An acceptance supra protest benefits only the party for whose honor it is made, and those subsequent to him. With the consent of the holder there might also be acceptances supra protest for the honor of prior parties: 1 Daniel, § 525. The drawee may also change his mind and accept supra protest. If the acceptor supra protest should fail, there might be a second acceptance, after a protest for better security. In Quebec, under the Code, an acceptor was bound to give notice without delay to the party for whose benefit he accepted, and to the other parties liable to him on the bill: C. C. 2297. This is not now required.

The acceptance for honor is conditional upon non-payment by the drawee. The bill must still be presented at maturity to the drawee, and protested for non-payment before being presented to the acceptor for honor, who is in the position of a surety, rather than as being primarily liable: sections 66, 67, s-s. 5.

ILLUSTRATIONS.

1. A defendant cannot be charged as an acceptor of a bill that has already been accepted, though conditionally, by the drawee: Spalding v. McKay, 5 U. C. O. S. 656 (1838).

2. Originally it was not necessary to protest a bill before an acceptance for honor: Mutford v. Walcot, 1 Ld. Raym. 575 (1697).

3. A protest was subsequently held to be a necessary preliminary in accordance with the custom of merchants: Vandewall v. Tyrrell, 1 M. & M. 87 (1827).

2. A bill may be accepted for honor for part only of the sum for which it is drawn. Imp. Act, s. 65 (2) Acceptance in part.

An acceptance for part only is a qualified acceptance: section 19, 2 (*b*): but does not require the assent of the drawer or indorsers: section 44, s-s. 2. Where a foreign bill has been accepted as to part, it must be protested as to the balance: ibid.

3. An acceptance for honor supra protest, in order to be valid, must— Must be in writing.

(*a*) Be written on the bill, and indicate that it is an acceptance for honor;

(*b*) Be signed by the acceptor for honor: Imp. Act, s. 65 (3). And signed.

The usual form of such an acceptance is "accepted for honor," "accepted supra protest," or more frequently simply, "accepted S. P.," with the signature of the acceptor, and if not accepted for the honor of the drawer, with a designation of the party for whose honor it is made. Formerly a notarial "act of honor" was necessary as in the case of a payment for honor. Brooks' Notary, 4th ed. 93; Mitchell v. Baring, 10 B. & C. 4 (1829); Gazzam v. Armstrong, 3 Dana. 554 (1835); section 68, s-s. 3: but this is not required by the Act. As to the requirements of an ordinary acceptance, see section 17.

4. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer: For whose honor.

§ 65.

Computation of time.

5. Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of protesting for non-acceptance, and not from the date of the acceptance for honor. Imp. Act, s. 54 (4) (5).

Sub-section 5 is copied from the Imperial Act with the single substitution of the word "protesting" for "noting," which really makes no change: section 92. In order to make it harmonize with section 11, s-s. 1 (*a*), the words "at sight or" should have been inserted as has been done in sections 12, 18, and 40 by the amending Act of 1891. It it likely, however, that the Courts will interpret it as if the change had been made (see section 14. s-s. 4); although the former rule was to calculate the maturity from the date of the acceptance and not of the protest: Williams v. Germaine, 7 B. & C. at p. 471 (1827).

Liability of acceptor for honor.

65. The acceptor for honor of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment and protested for non-payment, and that he receives notice of these facts: Imp. Act, s. 66 (1); C. C. 2296.

The acceptor for honor is only secondarily liable on the bill. It is sufficient that the bill be noted for protest, the formal protest may be extended subsequently: section 51, s-s. 4, and section 92. The reason for requiring a presentation for payment to the drawee at maturity, is that he may in the meantime have received effects or instructions that may lead him to pay the bill: Hoare v. Cazenove, 16 East. 398 (1812). If a place of payment is specified in the bill it should be presented there: section 45, s-s. 2 (*d*) (1).

In Quebec under the Code the acceptor for honor was bound to give notice of his acceptance without delay to the party for whose honor he accepted, and to the other parties who might be liable to him on the bill: C. C. 2297. This is no longer necessary.

To whom liable.

2. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted. Imp. Act, s. 66 (2).

The acceptor for honor is subject to the same estoppels as an ordinary acceptor, and if he has accepted for the honor of the drawer to the same estoppels as a drawer; see section 54 (*b*), and also section 55 (*b*); also Phillips v. Im Thurn, 18 C. B. N. S. 694 (1865), and L. R. 1 C. P. 471 (1866); Wilkinson v. Johnston, 3 B. & C. at p. 436 (1824).

Presentment to acceptor for honor.

66. Where a dishonored bill has been accepted for honor supra protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor, or referee in case of need: Imp. Act, s. 67 (1).

It is sufficient that the bill be noted for non-payment, the protest may be extended subsequently: section 51, s-s. 4, and section 92. It is optional with the holder to resort to the referee in case of need or not as he thinks fit: section 15. In Quebec, under the Code, presentment to the referee was compulsory: C. C. 2306.

Time for presentment.

2. Where the address of the acceptor for honor is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity: and where the address of the acceptor for honor is in

§ 66. some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him. Imp. Act, s. 67 (2).

The "day following" would mean the next business day: section 91. The Act is silent as to the effect of want of presentation to the acceptor for honor within the prescribed time. From the language used it would seem as if he would be discharged, and also any party to the bill who would have been discharged if he had paid it. See Story v. Patten, 3 Wend. (N. Y.) 486 (1830); Nouguier, § 583; also subsection 4.

Delay and excuses.

3. Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment. Imp. Act, s. 67 (3).

For the circumstances which excuse delay in presentment for payment or which dispense with presentment for payment, see section 46.

Protest for non-payment.

4. When a bill of exchange is dishonored by the acceptor for honor, it must be protested for non-payment by him. Imp. Act, s 67 (4).

The fact that a protest for non-payment is required in all cases where an acceptor for honor refuses to pay a bill, even when no one has indorsed the bill subsequent to his acceptance for honor, would seem to favor the idea, that failure to present it would not only release him, but also release the party for whose honor he had accepted and subsequent parties. Notice of dishonor should be sent to each of these parties. See Nouguier, § 1320, 1321.

67. Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn: Imp. Act, s. 68 (1); C. C. 2317. § 67. Payment for honor supra protest.

It is not necessary that the protest be actually extended before the payment for honor is made; it is sufficient that it be noted: section 92. The person for whose account a bill is drawn is in England called "the third account."

This section would appear to be applicable to promissory notes.

A person who takes up a bill supra protest for the benefit of a particular party to the bill succeeds to the title of the person from whom, not for whom, he receives it, and has all the title of such person to sue upon the bill, except that he discharges all the parties subsequent to the one for whose honor he takes it up, and that he cannot himself indorse it over: In re Overend, Gurney & Co., Ex parte Swan, L. R. 6 Eq. 344 (1868). See also Cowan v. Doolittle, 46 U. C. Q. B. 398 (1881); MacArthur v. MacDowall, 23 S. C. Can. 571 (1893); Ex parte Lambert, 13 Vesey, 179 (1806); Geralopulo v. Wieler, 10 C. B. 690 (1851); Ex parte Wyld, 2 DeG. F. & J. 642 (1860); Deacon v. Stodhart, 2 M. & Gr. at p. 320 (1841); Baring v. Clark, 19 Pick. (Mass.) 220 (1837); Schofield v. Bayard, 3 Wend. (N. Y.) 88 (1830).

The French Code de Commerce contains provisions similar to those of the present section: Arts 158, 159. It is there called payment by intervention. See also Pothier, Change, Nos. 113, 114, and Nouguier, §§ 1004-1009.

2. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill shall have the preference: Imp. Act, s. 68 (2). If more than one offer to pay.

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Attestation.

3. Payment for honor supra protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honor, which may be appended to the protest or form an extension of it: Imp. Act, s. 68 (3).

This notarial act of honor is necessary, in order to give the person who pays the rights and privileges accorded by the present section, and especially by sub-section 5. For the form for such an act, see Appendix.

Basis thereof.

4. The notarial act of honor must be founded on a declaration made by the payer for honor, or his agent in that behalf, declaring his intention to pay the bill for honor, and for whose honor he pays: Imp. Act, s. 68 (4).

5. Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for and succeeds to both the rights and duties of the holder as regards the party for whose honor he pays, and all parties liable to that party: Imp. Act, s. 68 (5).

If the holder is a holder in due course, or if any party to the bill subsequent to the party for whose honor the bill has been paid was a holder in due course, the payer for honor acquires their rights in this respect. Among the duties to which he succeeds is that of giving notice of dishonor: Goodall v. Polhill, 14 L. J. C. P. 146 (1845).

Delivery to payer for honor.

6. The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest. If the holder does not on demand deliver them up, he shall be

liable to the payer for honor in damages: Imp. Act, s. 68 (6). § 68.

"Protest" in this sub-section means the protest for non-payment by the acceptor, which is necessary in order to charge the acceptor for honor: per Chitty, J., In re English Bank and Bank of Brazil, [1893] 2 Ch. at p. 411.

7. Where the holder of a bill refuses to receive payment supra protest, he shall lose his right of recourse against any party who would have been discharged by such payment. Imp. Act, s. 68 (7). Holder's right to duplicate of lost bill

Lost Instruments.

Only two sections, 68 and 69, are devoted to this subject. The former gives the holder the right to demand a duplicate of a bill lost before maturity; the latter gives the party liable the right to indemnity when he is called upon to pay a lost bill.

The Act does not treat of the rules of evidence, by which secondary evidence is allowed in the case of a bill or note lost or destroyed.

68. Where a bill has been lost before it is overdue, the person who was holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again: Holder's right to duplicate of lost bill

2. If the drawer, on request as aforesaid, refuses to give such duplicate bill, he may be compelled to do so. Imp. Act, s. 69. If refused.

Before the passage of the Imperial Act this provision applied to inland bills and notes, under 9 Wm. III. c. 17.

§ 69. and 3-4 Anne, c. 8. Courts of Equity had extended it to indorsers as well as to the drawer. Chalmers (p. 236) speaks of the remedy as being still very inadequate, as it gives no power to obtain an indorsement or acceptance over again, and contrasts it with the remedy given by the Continental Codes, which have elaborate provisions on the subject. See Walmsley v. Child, 1 Vesey, sen. 341 (1749), and Rhodes v. Morse, 14 Jur. 800 (1850).

Presentment if bill is lost. The loss or destruction of a bill does not relieve from the duty of demanding payment. This should be accompanied by an offer of indemnity, and if payment is refused, protest may be made on a copy or written particulars: section 51, s-s. 8. "Neglect to offer indemnity to the maker or acceptor on demand of payment does not deprive the payee of his right of action, but it will prevent him from recovering costs, and will compel him to bear any special damages resulting from the neglect on his subsequent suit": 2 Daniel, § 1465; Thackray v. Blackett, 3 Camp. 164 (1812).

Action on lost bill. **69.** In an action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity is given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question. Imp. Act, s. 70.

At common law, if a negotiable bill were lost, no action could be maintained, either on the instrument or on the consideration for it, even if it was overdue when lost: Pierson v. Hutchinson, 2 Camp. 211 (1809); Hansard v. Robinson, 7 B. & C. 90 (1827); Ramuz v. Crowe, 1 Ex. 167 (1847); Crowe v. Clay, 9 Ex. 604 (1854).

Most of the provinces had provisions similar to the present section.

When the surrender of a bill or note has been obtained by fraud, by a forged renewal or otherwise, an action may be brought upon the bill or note so surrendered: Irwin v. Free-

man, 13 Gr. 165 (1867); McIntyre v. McGregor, 21 C. L. T. 25 (1900); Matthews v. Marsh, 5 O. L. R. 540 (1903); Scholefield v. Templer, 4 DeG. & J. 433 (1859). § 69.

When the defendant did not demand security a decree was made for plaintiff without requiring it: Abell v. Morrison, 23 Grant, 109 (1876).

The loss or destruction of the note must be proved and indemnity offered: Wante v. Robinson, 2 Rev. de Leg. 29 (1816); Beaupré v. Burn, 2 Rev. de Leg. 31 (1821). See Carden v. Ruiter, 9 L. C. J. 217 (1865); Wright v. Maidstone, 1 K. & J. 701 (1855). Lost bill.

No indemnity is required if the bill is not negotiable: Cooley v. Dominion Building Society, 24 L. C. J. 111 (1878); Contra, Pillow v. L'Esperance, Q. R. 22 S. C. 213 (1902). See Wain v. Bailey, 10 A. & E. 616 (1839).

ILLUSTRATIONS.

1. Where a note had been indorsed to an attorney's clerk and mislaid: Held, that secondary evidence of it could not be given without calling the clerk, although the attorney was called and swore to his belief of its loss: Grover v. Clark, 5 U. C. O. S. 208 (1835).

When the plaintiffs declared against the drawer of a lost bill to plaintiff's order on a promise to pay it, but did not state any new consideration for the promise, or allege that the bill was unindorsed at the time of the loss, the declaration was held bad on general demurrer: Russell v. McDonald, 1 U. C. Q. B. 206 (1844).

3. Payee against maker. Plea, loss of the note by plaintiff before suit, and that he hath been and is unable to produce it. Replication denying the loss only, held good: Campbell v. McCrea, 11 U. C. Q. B. 93 (1853).

4. When a lost bill is sued on, plaintiff should tender a bond with a sufficient surety or sureties. The Master may settle the bond: Orton v. Brett, 12 Man. L. R. 448 (1899).

5. A person suing on a lost note should, before action, tender an indemnity to the maker. If he neglect this, it will be at the risk of costs to defendant: Banque Jacques Cartier v. Strachan, 5 Ont. P. R. 159 (1869); King v. Zimmerman, L. R. 6 C. P. 466 (1871).

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6. Where the maker of notes is entitled to get them back, and the holder says they are lost and offers security, the former is not obliged to accept security, but is entitled to a payment into Court of the amount: Hudon v. Gervais, Q. R. 7 S. C. 221 (1895).

BILL IN A SET.

The provisions of the Act relating to bills in a set are all found in section 70. Bills in this form are usual for remittances abroad. To prevent delay in case the first should miscarry a second is frequently sent by a succeeding mail. In Canada a set is generally made up of three parts. Each part contains a condition that the others (naming them) are unpaid. See form in Appendix.

Bills in sets.

70. Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill: Imp. Act, s. 71 (1).

An agreement to deliver up certain sets of foreign bills which were drawn in three parts is not complied with by delivering up one of each set: Kearney v. West Granada Co., 1 H. & N. 412 (1856). A person who negotiates one part of a set does not warrant that he has the others: Pinard v. Klockman, 3 B. & S. 388 (1863). If one part of a set does not contain a reference to the other parts, a bona fide holder for value may recover on it as a separate bill: Davidson v. Robertson, 3 Dow, 218 (1815); Société Generale v. Metropolitan Bank, 27 L. T. N. S. 849 (1873).

If indorsed to different persons.

2. Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills: Imp. Act s. 71 (2).

See Holdsworth v. Hunter, 10 B. & C. 449 (1830).

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3. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him. Imp. Act, s. 71 (3). If negotiated to different holders.

See Perreira v. Jopp, 10 B. & C. 450 n. (1793); Lang v. Smyth, 7 Bing. 284 (1831).

4. The acceptance may be written on any part, and it must be written on one part only: Imp. Act, s. 71 (4). Acceptance.

5. If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill: Imp. Act, s. 71 (5). If more than one part is accepted.

See Holdsworth v. Hunter, supra.

6. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof: Imp. Act, s. 71 (6). Payment without delivery of proper part.

7. Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged. Imp. Act, s. 71 (7). Discharge.

As to how a bill may be discharged, see sections 59 to 63, inclusive.

§ 70. The discharge results from the rule in sub-section 1, that the whole of the parts constitute one bill. See Wells v. Whitehead, 15 Wend. (N.Y.) 527 (1836); Durkin v. Cranston, 7 Johns. (N.Y.) 442 (1811); Ingraham v. Gibbs, 2 Dallas 134 (1791).

When the first of a set was accepted and in the hands of a third party to cover advances to be made, but which he declined to make, the holder of the second who had made advances on condition he should get the first, was held entitled to the latter to the extent of his advances, as against the holder, who claimed to hold them for a former balance due him: Société Generale v. Agopian, 11 T. L. R. 244 (1895).

In an action against the drawer or indorsers, the part of the set which was protested must be produced: Downes v. Church, 13 Peters (U. S.) 205 (1839).

Conflict of Laws.

Section 71 lays down certain rules upon questions involving the conflict of laws or private international law. On some of the points thus settled, there had been a great conflict of authority and decisions in England and Canada. The section is copied from section 72 of the Imperial Act, with the single substitution of "Canada" for the words "United Kingdom" wherever they occur.

On account of the peculiar character of our federal constitution some new questions will arise here in consequence of the adoption of the language of the Imperial Act without change or definition. Is Canada one "country" within the meaning of sub-section 1? Or will the different provinces be considered as different countries for the purposes of the section with respect to matters as to which the Act itself makes different provisions for them, or where the provincial laws directly or indirectly affecting bills and notes differ so widely? The analogy of the United States does not afford us much assistance, as there the subject belongs to the individual States, each of which is, for purposes within its

jurisdiction, considered a distinct and independent sovereignty. In these respects the States retain their separate autonomies, and are deemed as much foreign to each other as if they did not form a union at all. As the rules laid down in this section are those generally recognized, it is probable that our Courts will apply them to a settlement of interprovincial as well as international questions.

The points which will arise under the Act involving such conflict between the laws of the different provinces, are numerous and important. Some of them will arise under provisions of the Act itself, such as that of the due date of a bill being affected in certain cases by the non juridical days differing in the different provinces under section 14; or the rules as to protests in Quebec differing from those in the other provinces. In clauses (c) and (e) of this section are laid down the rules which govern these cases. They will arise, however, chiefly from the conflict of provincial laws on such subjects as capacity, compensation, prescription, suretyship, etc.

It is to be borne in mind that it is a rule of international law that a discharge in the place where the contract is made is recognized as a discharge everywhere.

For a full discussion of the important questions arising under this head. the reader is referred to the standard works on the subject, and to the full reports of the leading cases, some of which are cited in the following notes on the various clauses of the section.

71. Where a bill drawn in one country is negotiated, accepted or payable in another, the rights, duties and liabilities of the parties thereto are determined as follows :— Rules where laws conflict.

(*a*) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, Validity, how determined.

§ 71. Conflict of laws.

or indorsement, or acceptance supra protest, is determined by the law of the place where such contract was made: Imp. Act, s. 72 (1).

"Country" is not defined in the Act. While, strictly speaking, Canada is one country for the purposes of bills and notes, these being assigned by section 91 of the British North America Act exclusively to the Dominion Parliament, it is probable that the Courts will apply the principles of the present section, which are the recognized rules of private international law, to cases where two or more provinces are concerned and there is a conflict between their laws. For instance, while the Act determines that the liability in a certain case may be joint or joint and several, it leaves to the law of the province which governs according to this section the determination of the consequences which flow from such a relation or liability. See Cook v. Dodds, 6 O. L. R. at p. 613 (1903).

"Drawing, in reference to bills of exchange, includes not only the writing and signing, but also the full execution by delivery": Wallace v. Souther, 2 S. C. Can. at p. 613 (1878). A bill is not "drawn" until it is issued, that is, delivered, complete in form, to the payee or indorsee if it is payable to order, or to some person as bearer, if it is payable to bearer: section 2. The contracts of acceptance and indorsement, like that of the drawer, are only complete upon delivery, so that it is the delivery in each case which determines the place of the contract: Chapman v. Cottrell, 34 L. J. Ex. 186 (1865).

A bill is presumed to have been issued and indorsed at the place where it bears date, and to have been accepted at the place at which the drawee is addressed, unless there is something on it to show that the contract was in fact made in some other place.

The rule in this sub-section, that the validity of a bill as regards the form of the bill itself, or of the acceptance or indorsement, is to be governed in each case by the lex loci

contractus, is one that is generally recognized. See on this point, Story on the Conflict of Laws, secs. 238, 260, 262; Westlake, § 228; 1 Daniel, §§ 867, 868. "Acts and deeds made out of Lower Canada are valid if made and passed according to the forms required by the law of the country where they were passed or made": C. C. Art. 7. See also Guepratte v. Young, 4 DeG. & Sm. at p. 228 (1851). § 71.

A bill drawn in Michigan, where a verbal acceptance is not recognized, upon a person in Illinois, where such an acceptance is binding, may be validly accepted by parol: Mason v. Dousay, 35 Ill. 424 (1864); Bissell v. Lewis, 4 Mich. 450 (1857).

A bill drawn in Illinois upon a person in Missouri, where a verbal acceptance is not legal, and verbally accepted by the drawee in Illinois, binds him: Scudder v. Union National Bank, 91 U. S. (1 Otto) 406 (1875).

A verbal agreement in Missouri by a Chicago firm to accept and pay in Chicago certain drafts for goods consigned, is governed by the law of Illinois, the place of performance, and is consequently binding: Hall v. Cordell, 142 U. S. 116 (1891).

It is doubtful how far the principle of such decisions would be law under the Act. The rule in the present clause is "subject to the provisions of this Act." Section 17 provides that an acceptance is invalid unless it is written on the bill and signed by the drawee.

See the notes and cases under clause (*b*), below.

Provided that— Proviso.

(1) Where a bill is issued out of Canada, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue; Imp. Act, s. 72 (1) (*a*). Bill not stamped.

This proviso adopts the well established rule of the common law that no country will regard or enforce the rev-

§ 71. enue laws of another country. See Story, secs. 245, 257; Boucher v. Lawson, Cas. temp. Hard. 89, 194 (1734); Holman v. Johnson, Cowp. 341 (1775); Biggs v. Lawrence, 3 T. R. 454 (1789); Lightfoot v. Tenant, 1 B. & P. 551, 557 (1796); Planche v. Fletcher, 1 Dougl. 251 (1779); James v. Catherwood, 3 D. & R. 190 (1823); Wynne v. Jackson, 2 Russ. 351 (1826); Ludlow v. Van Rensselaer, 1 Johns. (N. Y.) 94 (1806). The doctrine of Bristow v. Sequeville, 5 Ex. 275 (1850), that where the want of a stamp not only rendered a bill inadmissible in evidence but absolutely void in the foreign country where drawn, it would be held void in England, is not recognized by the Act, as regards bills drawn in one country and negotiated or payable in another.

Foreign bill treated as valid.

(2) Where a bill, issued out of Canada, conforms, as regards requisites in form, to the law of Canada, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold or become parties to it in Canada: Imp. Act, s. 72 (1) (*b*).

Bills of exchange were drawn in France by a domiciled Frenchman in the French language in English form on an English company, who duly accepted them. The drawer indorsed the bills and sent them to an Englishman in England. It was held that the acceptor could not dispute the negotiability of the bills by reason of the indorsements being invalid according to French law, when they would be valid indorsements according to the law of England: Re Marseilles Extension Ry. & L. Co., 30 Ch. D. 598 (1885).

Interpretation by lex loci contractus

(*b*) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance or acceptance supra protest of a bill, is determined by the law of the place where such contract is made: Imp. Act, s. 72 (2).

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The provisions of the Act to which this clause is subject are the succeeding clauses of this section, and section 53.

What is interpretation?

"Interpretation" is not defined in the Act. Is it to be taken in a narrow sense and confined simply to the "construction" of the drawing, indorsement or acceptance as the case may be? Or does it also include the nature and effect of these respective contracts, and the rights, obligations and liabilities of the parties who enter into them? In Alcock v. Smith, [1892] 1 Ch. at p. 256, Romer, J., says that he understands "interpretation" here to mean "legal effect," and he held that the indorsement of an English inland bill in Norway was governed by Norwegian law. This decision was affirmed in appeal. See No. 15 below.

The word "form" in clause (*a*) of this section, and "interpretation" in the present clause, may perhaps be used in the same sense as in the heading to sections 3 to 21 of the Act. If so, this would favor giving them the wider meaning.

It has been generally recognized as a rule of international law that where a contract is entered into in one place to be performed in another, it is to be governed as to its validity, nature and obligation by the law of the place of performance, in accordance with the maxim: contraxisse unusquisque in eo loco intelligitur, in quo, ut solveret, se obligavit. See Story on Conflict of Laws, secs. 280, 281; Westlake, § 229; 3 Burge, Col. Law, pp. 771, 772; Robinson v. Bland, 2 Burr. 1078 (1760); Fergusson v. Fyffe, 8 Cl. & F. 121 (1840); Andrews v. Pond 13 Pet. (U. S.) 65 (1839); C. C. Art. 8.

To give a wide meaning to the word "interpretation" in this section would not interfere with the principle just mentioned so far as the drawer and indorsers of a bill are concerned.

When a bill is drawn on a person in a foreign country or made payable there, what the drawer and indorsers agree to do is not to pay the bill in the foreign country, but they guarantee that it will be accepted and paid by the drawee, and if he does not do so, they will, if duly notified, reimburse the holder at the place where they have respectively drawn or indorsed the bill.

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Lex loci solutionis.

The contract of the acceptor, on the other hand, is to pay at the place of payment. If it is payable generally, or in the place where it is accepted, then no difficulty arises as to the application of the present clause; the law of the place of acceptance will govern. But if the bill is payable in a different country from that in which it is accepted, does the present clause apply? For instance, if a bill drawn in Montreal is accepted in Toronto and payable in New York, is the liability of the acceptor to be determined by the law of Canada? If so, the rule above quoted as to the law of the place of payment or performance of the contract is overridden by the Act.

Conflict of laws.

Burge suggests (vol. 3, p. 771) that the place of performance is, fictione juris, the locus contractus; and Westlake (p. 254) that the law of the place of fulfilment is really the law of that jurisdiction which would be the forum contractus according to true Roman principles. Byles says (p. 382), "where a contract is made in one country to be performed in another, the country where the contract is to be performed is deemed the country in which it was made." This, however, does not seem to be a satisfactory solution of the difficulty.

Westlake, in discussing this clause of the Imperial Act, which is identical with our own, says, § 229, "The obligation incurred by accepting a bill of exchange or making a promissory note, is measured by the law of the place where it is payable." There is no attempt made to harmonize this with the rule laid down in the Act, nor is attention called to the apparent discrepancy, or to the fact that in the Act there appears to be a clear line drawn between the law of the place of the contract, and that of the place where the bill is payable.

The enactment of clauses (*c*) and (*e*) of this section relating to presentment, protest and the due date of bills, apparently as exceptions to the rule in the present clause, would seem to suggest that in other respects the law of the place of contract is to govern.

A literal rendering of the present clause taken in connection with the introductory clause of the section would scarcely seem to cover the case of a promissory note made in one place and payable in another, but section 88 may be wide enough to authorize the necessary modifications.

ILLUSTRATIONS.

1. Where a note made and payable in Quebec was sued upon in Ontario, and a defence of no consideration valid in Ontario was set up, plaintiff who simply joined issue could not show that the consideration was valid by the law of Quebec. He should have replied that it was governed by Quebec law and have proved it like any other fact: Hope v. Caldwell, 21 U. C. C. P. 241 (1871); Robertson v. Caldwell, 31 U. C. Q. B. 402 (1871). See Benham v. Lord Mornington, 3 C. B. 133 (1846).

2. A note payable in the State of New York was signed by a firm and indorsed there by one of the partners and by two other persons for the accommodation of the firm. It was then taken by another partner to Canada and negotiated there. Held, that it was a Canada contract: Cloyes v. Chapman, 27 U. C. C. P. 22 (1876). See also Gay v. Rainey, 89 Ill. 221 (1878); Bell v. Packard, 69 Me. 105 (1879).

3. Defendant domiciled in Ontario, while in New York, drew a bill in favor of plaintiff upon a person in Ontario, who refused acceptance. Defendant, by drawing the bill, in effect guaranteed its acceptance and payment in Ontario, and in default, agreed to reimburse the holder at New York, so that his contract was governed by the law of New York: Story v. McKay, 15 O. R. 169 (1888); Potter v. Brown, 5 East, 124 (1804); Hicks v. Brown, 12 Johns. (N. Y.) 142 (1815); Powers v. Lynch, 3 Mass. 77 (1807); Prentiss v. Savage, 13 Mass. 20 (1816).

4. "Interpretation" in this section means "legal effect" or the liability of the parties to the bill. The liability of the drawer and indorsers of a bill drawn and indorsed at Buenos Ayres, on a drawee in New York, and payable there, is determined by the law of the Argentine Republic, and not by the law of New York: London & Brazilian Bank v. Maguire, Q. R. 8 S. C. 358 (1895).

5. A resident of Halifax while in Paris made a note for the accommodation of the payee and sent it to him at Halifax, where the payee negotiated it. Held, that the liability of the maker was governed by the law of Nova Scotia and not by that of France: Merchants' Bank v. Stirling, 13 N. S. (1 R. & G.) 439 (1880).

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Conflict of laws.

6. A bill was drawn in London upon a drawee in Leghorn who accepted. By the law of Leghorn if an acceptor has not sufficient funds of the drawer's in his hands, and the latter fails, the acceptance is vacated. It was held that the liability of the acceptor was to be determined by the law of Leghorn: Burrows v. Jemino, 2 Stra. 733 (1726).

7. A bill drawn in Belgium is indorsed in France. Held, that such indorsement is to be interpreted by the law of France: Trimbey v. Vignier, 1 Bing. N. C. 151 (1834); Bradlaugh v. De Rin, L. R. 3 C. P. 538 (1868).

8. A general acceptance given in Paris is to be interpreted by the law of France: Don v. Lippmann, 5 Cl. & F. at pp. 12, 13 (1837).

9. If a bill drawn in one country and payable in another is dishonored, the drawer is liable according to the law of the place where the bill was issued and not where it was payable: Allen v. Kemble, 6 Moore P. C. 314 (1848); Astor v. Benn, 2 Rev. de Leg. 27 (1812).

10. A bill drawn in California upon Washington is dishonored. The drawer is liable for interest at the rate in California: Gibbs v. Fremont, 9 Ex. 25 (1853).

11. A bill drawn in England upon a person in Spain is indorsed in Spain. Such indorsement must be construed by the law of Spain: per Brett, L.J., in Horne v. Rouquette, 3 Q. B. D. at p. 520 (1878).

12. Bills drawn and indorsed in England and payable in Milan are dishonored. The Milan holder sues the drawer and indorsers in England. They plead that the bills are Italian, and by the law of Italy plaintiff's remedy is lost because no action was taken within 15 days after protest. Held to be no defence in England: Cassanova v. Meier, 1 T. L. R. 245 (1885).

13. A man domiciled in Cape Colony, there assigned to his wife a policy on his life in an English company. He died at Cape Colony, being still domiciled there. Held, that the law of the colony which prohibited an assignment from husband to wife applied, and she could not recover: Lee v. Abdy, 17 Q. B. D. 309 (1886).

14. A note was signed and issued in Belgium. In an action by the indorsee against the maker, Belgian experts were examined as to whether the note was negotiable by Belgian law. The jury said they could not decide whether it was or not. This was held to be equivalent to a finding that the law of Belgium was not proved, and the note being negotiable by English law it was assumed that it would be by Belgian law, and judgment given in favor of plaintiff: Nouvelle Banque de l'Union v. Ayton, 7 T. L. R. 377 (1891).

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15. An inland English note payable to bearer, and overdue, was sold by judicial sale in Norway. By Norwegian law the transferee of an overdue note in good faith takes it free from equities. Held, that the transfer was governed by Norwegian law and defendant could not set up the equities attaching to the note which he had against the person who held it at maturity: Alcock v. Smith, [1892] 1 Ch. 238.

Indorsement of inland bill.

Provided, that where an inland bill is indorsed in a foreign country, the indorsement shall, as regards the payer, be interpreted according to the law of Canada. Imp. Act, s. 72 (2).

Before the Imperial Act of 1882 the principle of this proviso was recognized in both England and Scotland, not only as to indorsement, but also as to transfer by delivery.

ILLUSTRATIONS.

1. A promissory note, made and payable in England to bearer, is transferred by delivery in France where such transfer gives no title. Held, that the holder can recover: De la Chaumette v. Bank of England, 2 B. & Ad. 385 (1831).

2. A note made and payable in Scotland in favor of a person and not to his order or bearer, being negotiable by the law of Scotland, was indorsed in England, when such a bill was not negotiable there. Held, that it was a valid negotiation: Robertson v. Bendekin, 1 Ross, Scotch L. C. 824 (1843).

3. A bill of exchange was drawn, accepted and payable in England. It was indorsed in France in proper English form, but in one which would not by French law give the indorser the right to sue in his own name. Held, that the indorsee could recover from the acceptor in England: Lebel v. Tucker, L. R. 3 Q. B. 77 (1867).

Duties of holder.

(*c*) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonor, or otherwise, are determined by the law of the place where the act is done or the bill is dishonored. Imp. Act, s. 72 (3).

This is one of the provisions to which the rule laid down in clause (*b*) ante is subject.

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ILLUSTRATIONS.

1. A bill is payable in Buffalo. Presentment, etc., are governed by the law in force there. In the absence of proof of that law, it will be presumed to be the same as here, and no presentment being proved or notice of dishonor, drawer and indorsers are not liable: Buffalo Bank v. Truscott, 1 Rob. & Jos. Dig. 495 (1838). See Howard v. Sabourin, 5 L. C. R. 45 (1854); Allen v. McNaughton, 9 N. B. (4 Allen) 234 (1858).

2. Defendant indorsed in England to plaintiff a bill payable in Paris. Plaintiff indorsed to a Frenchman, who, on dishonor, had the bill protested and defendant notified according to French law. Held, that defendant was duly notified and was liable to plaintiff: Hirschfield v. Smith, L. R. 1 C. P. 340 (1866); Rothschild v. Currie, 1 Q. B. 43 (1841).

3. A bill drawn in England and payable in Spain is indorsed in England by defendant to plaintiff, who indorses it to M. in Spain. It is dishonored by non-acceptance, and twelve days later M. notifies plaintiff, who at once notifies defendant. The law of Spain does not require notice of non-acceptance. Defendant is liable to plaintiff: Horne v. Rouquette, 3 Q. B. D. 514 (1878).

Bill in foreign currency.

(*d*) Where a bill is drawn out of but payable in Canada, and the sum payable is not expressed in the currency of Canada, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable. Imp. Act, s. 72 (4).

This is the rule applied to the case of bills dishonored abroad: section 57 (3) (*b*). And the same rule governs where bills payable abroad in a foreign currency are sued upon in Canada. The holder is entitled to recover the amount according to the rate of exchange on the day of maturity or dishonor with interest thereon.

Due date.

(*e*) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable. Imp. Act, s. 72 (5).

This is one of the provisions to which the rule laid down in clause (*b*) ante, is subject. **71.**

ILLUSTRATIONS.

1. A note drawn in Montreal was made payable in New York. The third day of grace fell on Sunday. The note was protested on Saturday in accordance with the law of New York. Held, to be regular: Bank of America v. Copland, 4 L. N. 154 (1881).

2. A bill is drawn in England payable in Paris three months after date. Before it matures, a moratory law is passed in France, in consequence of war, postponing the maturity of all current bills for a month. The bill is subject to this French law: Rouquette v. Overmann, L. R. 10 Q. B. 525 (1875).

Capacity.—Any person who has capacity to contract may incur liability as party to a bill: section 22. Where there is a conflict of different laws on this question, the general rule, as stated ante pp. 118-121, is that it is governed by the law of the domicile. The Act has no provision on this question of conflict unless such a wide meaning should be given to the word "interpretation" in clause (*b*) of this section as to make it include the capacity of the parties, in which case the law of the place where the contract is made would govern.

Discharge.—The present rule is that a defence or discharge, good by the law of the place where the contract is made or is to be performed, is to be held of equal validity in every place where the question may come to be litigated. In England and America the same rule has been adopted, and acted on with a most liberal justice: Story on Conflict of Laws, secs. 331. 332. This rule would apply not only to the discharge of a bill, but also to the discharge of any party to it. The latter point arises most frequently with reference to discharges in bankruptcy. Potter v. Brown, 5 East. 124, 130 (1804); Smith v. Smith, 2 Johns. (N. Y.) 235 (1807); Blanchard v. Russell, 13 Mass. 1 (1816). When, however, a bill was drawn, accepted and payable in England, the bankruptcy and discharge of the acceptor in Australia did not relieve him from the bill: Bartley v. Hodges, 30 L. J. Q. B.

§ 71. 352 (1861). Where an Austrian bill was discharged by a partial payment there, it was held good in England when it would not have had that effect if paid there: Ralli v. Dennistoun, 6 Ex. at p. 496 (1861). If a bill is discharged by compensation in Demerara, it will be held discharged in England, where compensation would not have this effect: Allen v. Kemble, 6 Moore P. C. 314 (1838). So a bill discharged in Quebec by either compensation or prescription, would be held to be discharged in other countries where these would not operate as discharges as to bills made or payable there. See Huber v. Steiner, 2 Bing. N. C. 211 (1835); Harris v. Quine, L. R. 4 Q. B. 653 (1869); Story, sec. 582.

Evidence of foreign protest.

(*f*) If a bill or note, presented for acceptance, or payable out of Canada, is protested for non-acceptance or non-payment, a notarial copy of the protest and of the notice of dishonor, and a notarial certificate of the service of such notice, shall be received in all courts as prima facie evidence of such protest, notice and service

This clause is not in the Imperial Act. Con. Stat. C. (1859) c. 57, had a similar provision, but it applied only to protests in Upper or Lower Canada: Griffin v. Judson, 12 U. C. C. P. 430 (1862). See also Ewing v. Cameron, 6 U. C. O. S. 541 (1842); Ontario Bank v. Burke, 10 Ont. P. R. 561 (1885).

Lex loci contractus.—It seems evident that the general effect of this part of the Act will be to establish more firmly the law of the place where the contract is made, especially by construing in a liberal way s-s. 2 (*b*), and by giving a wide meaning to the word "interpretation" in that clause. Before the Act, the case of Lebel v. Tucker, L. R. 3 Q. B. 77 (1867), and the remarks of Cockburn, C.J., in Rouquette v. Overmann, L. R. 10 Q. B. 525 (1875), appeared to have somewhat shaken the doctrine laid down in Allen v. Kemble, 6 Moore P. C. 314 (1848), and Gibbs v. Freemont, 9 Ex.

25 (1853), in favor of the application of the law of the place where the contract was made. In the recent English case of Alcock v. Smith, [1892] 1 Ch. 238, ante p. 372, the corresponding clauses of the Imperial Act, which have been copied into our own. were considered, and the doctrine of the earlier cases above cited re-affirmed and even extended. In a recent Quebec case, London and Brazilian Bank v. Maguire, Q. R. 8 S. C. 358 (1895), ante p. 373, Andrews, J., has given a very able and comprehensive judgment, in which the English and American authorities on the subject are carefully reviewed, and in which he arrives at a similar conclusion. On principle. it would seem to be more equitable that a man should be bound by the law of the country where he incurs an obligation, and where he has the means of informing himself fully as to the precise extent of the obligation which he is actually incurring. § 71.

Lex loci solutionis.—The law of the place of payment is applied in the Act with respect to presentment, protest, etc., by clause (*c*), and to the due date of bills by clause (*e*). See also what is said ante p. 371. It has been laid down that interest on a bill dishonored by non-payment is determined by the law of the place of payment: Cooper v. Waldegrave, 2 Beav. 282 (1840). See also Re Gillespie, Ex parte Robarts, 18 Q. B. D. 286 (1886); Re Commercial Bank of South Australia, 36 Ch. D. 522 (1887); section 57.

Lex fori.—The law of the place where the action is brought or proceedings are taken governs as to all matters belonging to the remedy or mode of enforcement: De la Vega v. Vianna. 1 B. & Ad. 284 (1830). Under this head are comprised:—

1. The limitation of actions, subject to the operation of the law in places like Quebec when it operates as a discharge: Don v. Lippmann, 5 Cl. & F. 1 (1837); British Linen Co. v. Drummond, 10 B. & C. 903 (1830); Fergusson v. Fyffe, 8 Cl. & F. at p. 140 (1841); Pardo v. Bingham, L. R. 4 Ch.

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735 (1869); Alliance Bank v. Carey, 5 C. P. D. 429 (1880). See ante pp. 327-330.

2. Set-off, subject to the same limitations. See ante, p. 325.

3. The admission of evidence: Yates v. Thompson, 3 Cl. & F. 544 (1835); Bain v. Proprietors W. & F. Ry. Co., 3 H. L. Cas. 1 (1850); Leroux v. Brown, 12 C. B. 801 (1852); Williams v. Wheeler, 8 C. B. N. S. at p. 316 (1860).

PART III.

§ 72.

CHEQUES ON A BANK.

The third part of the Act, which is devoted to cheques, consists of ten sections, 72 to 81, inclusive. The first three of these relate to cheques generally, the remaining seven to crossed cheques. They are taken from the Imperial Act, with the single change that the word "bank" has been substituted for "banker."

In England banking business is carried on largely by individuals and incorporated companies; in Canada the Bank Act and the Bills of Exchange Act recognize only incorporated banks, so that "banker" would be inapplicable in either.

English and Canadian law differ.

Although this part of the two Acts is thus substantially identical. there are two marked differences regarding cheques between the law and the practice in the two countries. The first arises from the omission of section 60 of the Imperial Act from the Canadian Act, as already mentioned. It provides in effect that when a bill payable to order on demand is drawn on a banker, and he pays it in good faith in the ordinary course of business, he is not responsible although the indorsements are forged or unauthorized. As a cheque is a bill of exchange drawn on a banker payable on demand, and that section applies to cheques, the making of a cheque payable to order is in England little protection. An effort was made by the banks to have this clause embodied in the Canadian Act. but the House of Commons was unwilling to make the change. Crossed cheques have been adopted in England largely to overcome the danger arising from such forged indorsements. Under the Canadian law there is not

§ 72. the same necessity, and although the Act has introduced the English statute as to the crossing of cheques, the practice has been adopted only to a very limited extent.

The other great difference arises from the fact that the practice of getting cheques marked or accepted, so general in Canada, is almost unknown in England. Byles says, p. 35, that cheques are not accepted, and that to issue them accepted would probably be an infringement of the Bank Charter Acts.

A cheque drawn upon a private banker would not be a cheque within the meaning of the Act, and would not be subject to the special rules contained in this part of the Act, such as crossing and the like. It would be simply a bill of exchange, payable on demand, and subject to such provisions of the Act as apply to an instrument of that kind: Trunkfield v. Proctor, 2 O. L. R. 326 (1902).

Cheque defined.

72. A cheque is a bill of exchange drawn on a bank, payable on demand. Imp. Act, s. 73.

Reading this definition in connection with that of a bill of exchange in section 3, a cheque is an "unconditional order in writing addressed by a person to a bank, signed by the person giving it, requiring the bank to pay on demand a sum certain in money to, or to the order of a specified person, or to bearer."

As to bills payable on demand, see section 10.

According to the definition in section 2 (*c*), "bank" means "an incorporated bank or savings bank carrying on business in Canada"; that is, one of the banks to which the Bank Act, 53 Vict. chap. 31, applies; or the City and District Savings Bank of Montreal, or La Caisse d'Economie de Notre Dame de Quebec: 53 Vict. chap. 32; or a bank under an old provincial charter.

In Quebec, under the Code, a cheque might be drawn upon a private banker as well as upon an incorporated bank: Art. 2349. This was the law before the Act in the other provinces also.

A cheque should be addressed to the bank by its proper corporate name, and not to the "cashier," "manager" or "agent" of the bank. An instrument addressed to one of these would not, strictly speaking, be a cheque within the meaning of the Act, and if marked or accepted it might be claimed that the bank was not liable, as it would not be the drawee of the instrument and consequently could not become liable by acceptance. § 72. Form of cheque.

The words "on demand" need not be on the cheque, as they are understood when no time for payment is expressed: sec. 10 (b).

A document in the form of cheque addressed by one branch of a bank to another branch of the same bank is not a cheque within the meaning of this section: Brown v. National Bank, 18 T. L. R. 669 (1902); Capital and Counties Bank v. Gordon, [1903] A. C. 240; London City and Midland Bank v. Gordon, [1903] A. C. 240.

An order in the form of an ordinary cheque with the following words: "Provided the receipt form at the foot hereof is duly signed, stamped and dated." is not a cheque: Bavins v. London and S. W. Bank, [1900] 1 Q. B. 170.

A cheque is not invalid because it is not dated, nor because it does not specify the place where it is drawn: section 4; nor because it is antedated, or postdated, or bears date on a Sunday or other non-juridical day: sec. 13, s-s. 2; Wood v. Stephenson, 16 Q. C. B. 419 (1858); and the fact that it is postdated is not an irregularity: Hitchcock v. Edwards, 60 L. T. N. S. 636 (1889); Carpenter v. Street, 6 T. L. R. 410 (1890). But a cheque dated seven days after delivery is in substance a bill of exchange at seven days' date: Forster v. Mackreth, L. R. 2 Ex. 163 (1867). A bank should not pay a cheque before the day of its date: Da Silva v. Fuller, cited in Morley v. Culverwell, 7 M. & W. 178 (1840).

In the United States there has been a conflict as to whether a cheque may be made payable on a day subsequent to its date. The weight of authority is in favor of what is law under our Act, that such an instrument is not a cheque,

§ 72. and has three days' grace. See Bowen v. Newell, 13 N. Y. 290 (1855); Morrison v. Bailey, 5 Ohio St. 13 (1855); Harrison v. Nicollet Bank, 41 Minn. 488 (1889); 2 Daniel, § 1574. But see contra, Re Brown. 2 Story, C. C. 502 (1843); Westminster Bank v. Wheaton, 4 R. I. 30 (1856); Champion v. Gordon, 70 Penn. St. 474 (1872); Way v. Towle, 155 Mass. 374 (1892).

The Act does not make it a part of the definition that the drawer should be a customer of the bank; but if a person gets goods or money on the strength of a cheque when he has no account, he is guilty of obtaining the goods or money by false pretences, and is liable to three years' imprisonment: Criminal Code, 1892, sec. 359; Rex v. Jackson, 3 Camp. 370 (1813); Reg. v. Hazelton, L. R. 2 C. C. 134 (1874).

There have been conflicting decisions as to whether a cheque is money. A good deal will depend on the language of the statute to be construed. It has been held that the indorsing and giving to a creditor the unaccepted cheque of a third person in the debtor's favor, is not a payment of "money" within the meaning of section 3 of R. S. O. ch. 124: Davidson v. Fraser, 28 S. C. Can. 498 (1897). Where, however, an insolvent trader sold his stock to a bona fide purchaser, and the latter gave his cheque to the bank of the seller, which had a mortgage on the stock, this was held to be a payment of money: Gordon Mackay v. Union Bank, 26 Ont. A. R. 155 (1899). A marked cheque is "cash" within the meaning of the land regulations: Russell v. Sealy. 2 N. Z. R. (C. A.) 498 (1874).

Provisions as to bills apply to cheques.

2. Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque. Imp. Act, s. 73.

The exceptions are. (1) that failure to present a cheque for payment within a reasonable time does not discharge the drawer, except in so far as he is damaged thereby: sec. 73,

(2) that the bank should not pay after notice of the customer's death: sec. 74; and (3) the provisions relating to crossed cheques: secs. 75 to 81, inclusive.

The law as to the presentment of a cheque for payment differs from that respecting a bill of exchange payable on demand. In suing on a cheque it is not necessary to allege or prove presentment within a reasonable time or protest for non-payment. These are matters of defence. It is for the drawer to allege and prove damage: DeSerres v. Euard, Q. R. 17 S. C. 199 (1899).

The chief provisions of the Act relating to bills payable on demand, which also apply to cheques, are the following: (1) There are no days of grace: sec. 14; (2) when they appear on their face to have been in circulation for an unreasonable length of time they are deemed to be overdue, so as to prevent a holder from acquiring them free from defects of title: sec. 36, s-s. 3; (3) they must be presented for payment within a reasonable time after indorsement to charge an indorser: sec. 45, s-s. 2 (*b*).

Cheque not an assignment of funds.

A cheque being a bill of exchange does not operate as an assignment of funds in the hands of the bank available for the payment thereof, and until it accepts a cheque the bank is not liable on it: sec. 53. The holder of an unaccepted cheque, consequently, cannot sue the bank upon it, except under the circumstances mentioned in section 73 (*c*). Under the Code it was held in Quebec that a cheque was an assignment of so much of the drawer's funds: Marler v. Molsons Bank, 23 L. C. J. 293 (1879). This is the law in Scotland: sec. 53, s-s. 2, of the Imperial Act; and also in France: Nouguier, §§ 392, 431.

ILLUSTRATIONS.

1. The production of a cheque is not even prima facie evidence of money lent by the drawer: Foster v. Fraser, Rob. & Jos. Dig. 652 (1840); Nichols v. Ryan, 2 R. L. 111 (1868); Dufresne v. St. Louis, M. L. R. 4 S. C. 310 (1888).

§ 72. 2. A cheque may be postdated, and is then payable on the day of its date without grace: Wood v. Stephenson, 16 U. C. Q. B. 419 (1858).

3. Where plaintiffs accepted from defendant a cheque of a third party in part payment of goods, and presented it at the bank the next day, and also applied several times to the drawer, but did not notify the defendant for a week, held that the latter was not liable: Redpath v. Kolfage, 16 U. C. Q. B. 433 (1858).

4. Plaintiff deposited in defendant's bank the cheque of a third party on another bank in the same town. Defendants credited it in his pass-book as cash and stamped it as their property. They presented it the next business day when it was dishonored. If they had presented it the same day it would have been paid. Held, that the bank was not liable: Owens v. Quebec Bank, 30 U. C. Q. B. 382 (1870).

5. A cheque operates as payment until it has been dishonored. It may be received either as conditional or as absolute payment: Hughes v. Canada Permanent L. & S. S., 39 U. C. Q. B. 221 (1876); Felix v. Hadley, [1898] 2 Ch. 680.

6. Where a bank paid cheques on forged indorsements, the receipt given by the plaintiffs at the end of the month was, at most an acknowledgment that the balance was correct on the assumption that the cheques had been paid to the proper parties. Where the names of the payees had also been forged on an application for a loan to plaintiffs, the cheques were not payable to fictitious payees: Agricultural S. & L. Association v. Federal Bank, 6 A. R. 192 (1881).

7. The Bank of Montreal allowed a private banker at London to put on his cheques, "payable at Bank of Montreal, Toronto, at par." Held, that these words simply meant that there would be no charge for cashing the cheques, and not that the Bank of Montreal would pay them if there were no funds of the drawer to meet them: Rose-Belford Printing Co. v. Bank of Montreal, 12 O. R. 544 (1886).

8. The Finance Minister deposited a cheque on the Bank of P. E. I. in the Bank of Montreal at Ottawa which placed the amount to his credit. On the dishonor of the cheque the Bank of Montreal was entitled to reverse the entry, as it was not a holder for value, but merely an agent for collection: The Queen v. Bank of Montreal, 1 Exch. Can. 154 (1886).

9. The payee of a cheque took it to the bank on which it was drawn the same day as he received it from the drawer, and had it marked "good," the amount being charged to the drawer's account; but he did not demand payment. The bank suspended payment that evening, and the next day the cheque was presented for payment and

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dishonored. Held, that the drawer was discharged from all liability thereon: Boyd v. Nasmith, 17 O. R. 40 (1888); Legare v. Arcand, Q. R. 9 S. C. 122 (1895); Banque Jacques Cartier v. Corporation de Limoilou, Q. R. 17 S. C. 211 (1899); Faucher v. Mason, Q. R. S. C.; Merchants' Bank v. State Bank, 10 Wall (U.S.) 647 (1870); First National Bank of Jersey City v. Leach, 52 N. Y. 350 (1873).

10. The handing by a debtor to his creditor of the unaccepted cheque of a third person is not a "payment of money to a creditor" within the meaning of R. S. O. c. 124, s. 3, s.-s. 1: Davidson v. Fraser, 28 S. C. Can. 272 (1897); overruling Armstrong v. Hemstreet, 22 O. R. 336 (1892).

11. A cheque was sent to plaintiffs' solicitor marked "in full re Mason." The solicitor cashed it, and wrote defendant refusing to accept it in full. Plaintiff ratified his solicitor's action. Held, following Day v. McLea, 22 Q. B. D. 610, that plaintiff was entitled to proceed for the balance: Mason v. Johnston, 20 Ont. A. R. 412 (1893).

12. An insolvent trader sold his stock to a bona fide purchaser. Both were customers of the same bank which had a mortgage on the stock. The purchaser gave the bank his cheque in payment. This was held to be a "payment in money": Gordon Mackay v. Union Bank, 26 Ont. A. R. 155 (1899).

13. A bank was held liable for the amount of a cheque it had lost, which the drawer disputed, although the latter had been guilty of negligence in not objecting earlier when it was entered in his pass-book: Fournier v. Union Bank, 2 Stephens' Que. Dig. 90 (1873)

14. Where an account bears interest, it ceases on the amount of a cheque drawn on the account when the cheque is marked, although the money is not actually drawn out until long after: Wilson v. Banque Ville Marie, 3 L. N. 71 (1880).

15. A bank was held liable to the holder of a marked cheque: Banque Nationale v. City Bank, 17 L. C. J. 197 (1873); even when marked good only on a future day by the president and cashier: Exchange Bank v. Banque du Peuple, M. L. R. 3 Q. B. 232 (1886). Items of claim older than a cheque cannot properly be set up in compensation against it: Dorion v. Dorion, 5 L. N. 130 (1882).

16. An instrument in the form of a cheque is none the less a cheque because not drawn against money on deposit, but because an overdraft or advance by the bank: Bank of Montreal v. Rankin, 4 L. N. 302 (1881).

17. A cheque should be presented the day after delivery and notice of dishonor given to charge the indorser: Lord v. Hunter, 6 L. N. 310 (1883).

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18. A bank acting as agent for another bank is not authorized in the absence of an express agreement, to cash a cheque drawn upon the principal bank, but not accepted by it: Maritime Bank v. Union Bank, M. L. R. 4 S. C. 244 (1888).

19. A cheque payable to C. M. & S., or bearer, was indorsed by them and stamped for deposit to their credit in the bank where they kept their account. Their clerk, instead of depositing it, took it to the bank on which it was drawn, and the teller paid it without noticing the writing on the back. It was held that such a cheque could not be restrictively indorsed, and the bank so paying it was not liable: Exchange Bank v. Quebec Bank, M. L. R. 6 S. C. 10 (1890).

20. Where a person for accommodation lends his cheque to another person he cannot refuse to pay the same to a third person who in good faith has given value for it: Kenny v. Price, 20 R. L. 1 (1890).

21. A person receiving a cheque seven months after its date, and after it was drawn, has no greater right against the drawer than the previous holder, in whose hands it was void as having been given for illegal expenditure at an election: Dion v. Boulanger, Q. R. 4 S. C. 358 (1893); confirmed in Review, 31st Oct., 1893.

22. A third party, who is the holder in good faith of a cheque given in settlement of a gambling debt, can recover the amount. The fact that the cheque was not presented at the bank until a month after it was drawn is not a sufficient defence: Dion v. Lachance, Q. R. 14 S. C. 77 (1898).

23. Cheques and other negotiable instruments are presumed to have been given for value although this may not be expressed. The evidence to rebut this presumption must be clear and convincing. Larraway v. Harvey, Q. R. 14 S. C. 97 (1898).

24. L. gave an agent, A., a cheque payable to the order of M. marked "deposit," to be used as a deposit on a purchase from the latter through his intervention. M. indorsed and applied the cheque on an old account against A. Held, that M. was, under the circumstances, bound to account to L. for the amount of the cheque: Lebschitz v. Montreal Street Ry. Co., Q. R. 9 Q. B. 518 (1899).

25. The payee of a cheque indorsed it and gave it for collection to a bank which placed to her credit the amount less the cost of collection, and sent it to the bank on which it was drawn, accepting a draft on the head office of the latter bank. This was sent through the clearing house, but before presentation the bank (drawee) had suspended payment. Held, that the payee incurred only the ordinary

liability of an indorser and was liberated by the surrender of the cheque, and the acceptance of the draft: Banque de St. Hyacinthe v. Guilbault, 8 R. J. 115 (1901). § 72.

26. The statement that a cheque "was duly presented for payment" is sufficient: Knauth Nachod v. Stern, 30 N. S. 251 (1897). See also Crowell v. Longard, 28 N. S. 257 (1896).

27. The initialling of a cheque by the cashier does not amount to an acceptance. A cheque so initialled received by the defendant only a few days before the trial, when it was more than four years old, could not be used by him as a set-off to the bill of exchange on which he was sued: Commercial Bank v. Fleming, 1 Stevens' N. B. Dig. 294 (1872).

28. H. owed defendant $500, and induced him to indorse his (H.'s) cheque for $1,000 on a bank at N., out of the proceeds of which the debt was to be paid. The two went to a bank at W. to get cash for the cheque. H. alone went into the manager's room, and on his return told the defendant he had given the cheque to the manager to forward it to N. for collection. H. in fact retained the cheque and the same day transferred it to plaintiff for value. Held, that defendant was liable on the cheque. Arnold v. Caldwell, 1 Man. 81 (1884).

29. Where a bank certified a cheque at the request of the drawer, who afterwards altered it, making it payable to bearer instead of to order; this is a material alteration, and the bank is not liable on the cheque to the drawer or his assigns: Re Commercial Bank, Banque d'Hochelaga's Case, 20 Man. 171 (1894).

30. A banker paid a cheque where the amount had been raised, but in such a way that it could not be easily detected. He was held liable to the customer for the difference between the genuine and the altered cheque: Hall v. Fuller, 5 B. & C. 750 (1826).

31. Where a cheque was so carelessly drawn as to be easily altered by the holder to a larger sum, so that the bankers, when they paid it, could not distinguish the alteration: Held, that the loss must fall on the drawer, as it was caused by his negligence: Young v. Grote, 4 Bing. 253 (1827).

32. Filling in a blank cheque with a larger sum than that authorized is forgery: Reg. v. Wilson, 2 C. & K. 527 (1847).

33. The holder of an unaccepted cheque has no right of action against a bank even if it has improperly refused to honor the cheque, as there is no privity of contract between him and the bank: Malcolm v. Scott, 5 Exch. 601 (1850); Fourth St. Bank v. Yardley, 165 N. S. 634 (1897).

§ 72. 34. If there are not sufficient funds to meet a cheque the bank should not give any more than the information of the fact; it should not disclose the actual balance: Foster v. Bank of London, 3 F. & F. 214 (1862).

35. An authority to draw cheques does not necessarily include an authority to draw bills: Foster v. Mackreth, L. R. 2, Ex. 163 (1867).

36. The cheque of a third party may be the subject of a valid donatio mortis causa: Veal v. Veal, 27 Beav. 303 (1859): Clement v. Cheeseman, 27 Ch. D. 631 (1884). The cheque of the donor not presented until after his death is not. Hewitt v. Kaye, L. R. 6 Eq. 198 (1868); Beak v. Beak, L. R. 13 Eq. 489 (1872). It is, if presented, even though not paid: Bromley v. Brunton, L. R. 6 Eq. 275 (1868).

37. A cheque is not an equitable assignment of so much of the drawer's funds in the hands of his banker, or of a chose in action: Hopkinson v. Foster, L. R. 19 Eq. 74 (1874); Schroeder v. Central Bank, 34 L. T. N. S. 735 (1876).

38. The rule of law that an indorsee of a bill of exchange who takes it after maturity, takes it on the credit of, and can stand in no better position than his indorser, does not apply to cheques London and County Banking Co. v. Groome, 9 Q. B. D. 288 (1881).

39. A cheque sent as being "in full of all demands" was retained and cashed and a receipt sent as an account. The drawer demanded the return of his cheque; the creditor sued for the balance of his claim. Held, that there was not conclusive evidence of accord and satisfaction; it was a question on what terms the cheque was sent and accepted; and plaintiff recovered judgment for the balance: Day v. McLea, 22 Q. B. D. 610 (1889).

40. A tenant proposed to assign his lease, and the landlord handed a license to sub-let to an auctioneer and house agent, with instructions to deliver it only on receipt of the rent. The agent accepted the tenant's cheque for the amount, and gave up the license. The cheque was dishonored. The agent was held liable for the amount: Pape v. Westacott, [1894] 1 Q. B. 272

41. Where a person pays a postdated cheque into his bank in order that the amount may be placed to the credit of his account, and the amount is so placed, the bank are holders for value of the cheque: Royal Bank v. Tottenham, [1894] 2 Q. B. 715.

42. A cheque is drawn in favor of a person who does not really exist, although the drawer supposes that he does. This does not prevent the cheque being really paid to bearer, under sec. 7, sub-sec.

8, of the Bills of Exchange Act, as being payable to a fictitious or non-existing person: Clutton v. Attenborough, [1897] A. C. 90.

43. A solicitor who is authorised to accept a tender of mortgage money on behalf of his client is not at liberty to accept a banker's cheque, and the tender of a cheque is insufficient: Blumberg v. Life Interests and R. S. Corporation, [1898] 1 Ch. 27.

44. Where a cheque was given in payment of bets on horse races, and indorsed for value to the plaintiff, who was ignorant of the consideration, it was held that he could not recover, as the consideration was illegal under 5 & 6 William IV. c. 41: Woolf v. Hamilton, [1898] 2 Q. B. 337.

45. The only effect of the drawee bank initialling a cheque for the drawer is to certify that it has funds sufficient to meet its payment, and to add its credit to that of the drawer. When the drawer deposited such a cheque in another bank, which credited her with the amount, the presumption is that the latter bank accepted it as the agent of the depositor for collection, and not as acquiring title and guaranteeing its payment: Gaden v. Newfoundland Savings Bank, [1899] A. C. 281.

46. Defendant, who was not a party to a cheque, at the request of the payee, wrote his name on the back of it, adding the words, "sans recours." It was held that under section 16 of the Bills of Exchange Act, he could thus negative his liability as an indorser: Wakefield v. Alexander, 17 T. L. R. 217 (1901).

47. If the drawer in his own behalf, or for his own benefit, gets his cheque certified, and then delivers it to the payee, the drawer is not discharged: but if the payee or holder in his own behalf, or for his own benefit, gets it certified instead of getting it paid, then the drawer is discharged: Minot v. Russ, 156 Mass. 458 (1892).

48. Where it is admitted that a cheque was obtained without consideration, and was invalid in the hands of the immediate payee, the plaintiff must prove either that he is a bona fide holder, or that the person from whom he received it had taken it for value without notice of defect in its inception: Thompson v. Sioux Falls Nat. Bank, 150 U. S. 231 (1893).

49. If the drawer of a cheque gets it accepted and then delivers it to the payee, the drawer is not discharged: and if the payee before delivery requests the drawer to send it to the bank and get it accepted, the rule is the same: Randolph Bank v. Hornblower, 160 Mass. 410 (1894).

50. The payee of a cheque indorsed it to a person who held it for several weeks. The drawer paid the amount to the payee on the

§ 73. representation that the latter had lost it. The drawer was held liable to the holder notwithstanding it was the delay of the latter that enabled the payee to deceive the drawer: Bradley v. Angus, 107 Fed. R. 196 (1901).

Presentment of cheque for payment.

73. Subject to the provisions of this Act—

(*a*) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment, as between him and the bank, to have the cheque paid, and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such bank to a larger amount than he would have been had such cheque been paid; Imp. Act, s. 74 (1),

The provisions of the Act to which this section is subject, are those in section 46 relating to excuses for non-presentment and delay in presentment.

As regards the drawer, the effect of not presenting a cheque for payment within a reasonable time differs from that relating to other bills payable on demand. In the case of the latter the drawer as well as the indorsers are wholly discharged by the failure to present it for payment within a reasonable time: sec. 45. This part of the Act relating to cheques does not modify the rule as regards the indorsers: but the present section lays down a different rule as regards the drawer, who is only discharged to the extent to which he actually suffers damage by the delay.

Chalmers says, p. 250: "This section is new law. It was introduced in the Lords by Lord Bramwell to mitigate the rigor of the common law rule. At common law the mere omission to present a cheque for payment did not discharge the drawer, until, at any rate, six years had elapsed, and in this respect the common law appears to be unaltered. But

if a cheque was not presented within a reasonable time, as defined by the cases, and the drawer suffered actual damage by the delay, e.g., by the failure of the bank, the drawer was absolutely discharged, even though ultimately the bank might pay (say) fifteen shillings in the pound." The section is substantially the law of Quebec before the Act, the Code placing the indorsers in the same position:—"If the cheque be not presented for payment within a reasonable time, and the bank fail between the delivery of the cheque and such presentment, the drawer or indorser will be discharged to the extent of the loss he suffers thereby": Art. 2352. See also Re Oulton, 15 N. B. (2 Pugs.) 333 (1874). § 73.

When the drawer or other person is thus discharged, the holder is a creditor to the bank to the extent of such discharge: clause (*c*).

(*b*) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and of banks, and the facts of the particular case; Imp. Act, s. 74 (2). Reasonable time.

The following are said to embody the rules as to what is a reasonable time for the presentment of cheques in England:—

1. If the person who receives a cheque and the bank on whom it is drawn are in the same place, the cheque must, in the absence of special circumstances, be presented for payment on the day after it is received: Alexander v. Burchfield, 7 M. & Gr. 1061 (1842); Firth v. Brooks, 4 L. T. N. S. 467 (1861).

2. If the person who receives a cheque and the banker on whom it is drawn are in different places, the cheque must, in the absence of special circumstances, be forwarded for presentment on the day after it is received, and the agent to whom it is forwarded must, in like manner, present it or forward it on the day after he receives it: Hare v. Henty, 10 C. B. N. S. 65 (1861); Prideaux v. Criddle, L. R. 4 Q. B. 455 (1869); Heywood v. Pickering, L. R. 9 Q. B. 428 (1874).

3. In computing time, non-business days must be excluded: and when a cheque is crossed, any delay caused by presenting the cheque pursuant to the crossing is excused: sec. 91.

§ 73. These rules are substantially those that have been recognized in Canada. See Redpath v. Kolfage, 16 U. C. Q. B. 433 (1858); Owens v. Quebec Bank, 30 ibid. 382 (1870); Boyd v. Nasmith, 17 O. R. 40 (1888); Blackley v. McCabe, 16 Ont. A. R. 295 (1889); Sawyer v. Thomas, 18 Ont. A. R. 129 (1890); Marler v. Stewart. 2 Stephens' Que. Dig. 111 (1878); Campbell v. Riendeau, Q. R. 2 Q. B. 604 (1892).

A cheque is deemed to be stale or overdue when it appears on its face to have been in circulation for an unreasonable time: sec. 36, s-s. 3. A bank is not justified in paying such a cheque without inquiry: Serle v. Norton. 2 M. & Rob. 401 (1841).

Whether a cheque is presented within a reasonable time is a question for the jury: Wheeler v. Young, 13 T. L. R. 468 (1897).

As to what is a reasonable time when a cheque is drawn on a bank that is understood to be about to suspend payment, see Legare v. Arcand, Q. R. 9 S. C. 122 (1895).

It has been held that a delay of six days is not necessarily an unreasonable time: Rothschild v. Corney, 9 B. & C. 388 (1829); and the same as to eight days: London and County Bank v. Groome, 8 Q. B. D. 288 (1891); but that two months is an unreasonable time: Serrell v. Derbyshire Ry. Co., 9 C. B. 811 (1850).

Holder a creditor of the bank.

(c) The holder of such cheque, as to which such drawer or person is discharged, shall be a creditor, in lieu of such drawer or person, of such bank to the extent of such discharge, and entitled to recover the amount from it. Imp. Act, s. 74 (2), (3).

This is, to a certain extent, a modification of the rule in section 53. In England it introduced partly the Scotch principle of sub-section 2 of that section, and in Canada it recognizes in this particular case the principle laid down in Quebec in Marler v. Molsons Bank. 23 L. C. J. 293 (1879). These countries adopted it from the civil law.

§ 74. Revocation of bank's authority.

74. The duty and authority of a bank to pay a cheque drawn on it by its customer are terminated by—

(*a*) Countermand of payment;

(*b*) Notice of the customer's death. Imp. Act, s. 75.

Bank paying cheques, bills, etc.

A bank having sufficient funds of the drawer of a cheque in its hands is bound to pay it, and in case of refusal is liable to an action of damages: Marzetti v. Williams, 1 B. & Ad. 415 (1830); Whitaker v. Bank of England, 6 C. & P. 700 (1835); Foley v. Hill, 2 H. L. Cas. 28 (1848); Rolin v. Steward, 14 C. B. 595 (1854); Todd v. Union Bank, 4 Man. R. 204 (1887); Fleming v. Bank of New Zealand, 16 T. L. R. 469 (1900). The damages recoverable by a non-trader for the wrongful refusal of a bank to allow him to withdraw a special deposit, are nominal or limited to interest on the money: Henderson v. Bank of Hamilton, 25 O. R. 641 (1894); Bank of New South Wales v. Milvain, 10 Vict. R. (Law) 13 (1884).

A bank may, without special instructions, pay any bills, or notes, of which the customer is acceptor or maker, and which are payable at the bank: Jones v. Bank of Montreal, 29 U. C. Q. B. 448 (1869); Kymer v. Laurie, 18 L. J. Q. B. 218 (1849); Robarts v. Tucker, 16 Q. B. 560 (1851); Bank of England v. Vagliano, [1891] A. C. 107.

A bank refusing to pay such instruments incurs the same liability as in refusing to pay a cheque: Hill v. Smith, 12 M. & W. 618 (1844); Bell v. Carey, 8 C. B. 887 (1849).

Cheques are payable in the order in which they are presented, irrespective of their dates, provided the date is not subsequent to the presentment: Kilsby v. Williams, 5 B. & Ald. 815 (1822).

Where a customer keeps his account at one branch of the bank, other branches are not bound to honor his cheques: Woodland v. Fear, 7 E. & B. 519 (1857). But if he has

§ 74. accounts in two or more branches the bank may combine them against him, provided they are all in the same right: Garnett v. McKewan, L. R. 8 Ex. 10 (1872); Prince v. Oriental Bank, 3 A. C. 325 (1878).

If, however, the course of dealing was such that the customer was allowed to draw upon one account irrespective of the state of the other, the bank cannot combine them against him without a reasonable notice that the former course of dealing would be discontinued: Buckingham v. London & Midland Bank, 12 T. L. R. 70 (1895).

Entries made in a customer's pass book are prima facie evidence against the bank: Commercial Bank v. Rhind, 3 Macq. H. L. 643 (1860); Couper's Trustees v. National Bank of Scotland, 16 Sess. Cas. 412 (1889).

Countermand.—A customer may stop payment of a cheque before it is accepted, but not after: Cohen v. Hale, 3 Q. B. D. 371 (1878); McLean v. Clydesdale Bank, 9 A. C. 95 (1883).

When a cheque is handed to a person on a condition which the drawer finds is to be broken or eluded, he has the right to stop the payment of the cheque: Wienholt v. Spitta, 3 Camp. 376 (1813); Spincer v. Spincer, 2 M. & Gr. 295 (1841).

It has also been held that a bank is not bound to honor a customer's cheque after a garnishee order is served on it, even although the balance exceed the judgment: Rogers v. Whiteley, [1892] A. C. 118.

Defendant gave plaintiff a cheque on account of a contract for refreshments during the King's coronation, which provided that in case of cancellation of the ceremony there should be no liability. Payment of the cheque was stopped and plaintiff's action on it dismissed: Elliott v. Crutchley, [1903] 2 K. B. 476; affirmed in appeal, 20 T. L. R. 28[illegible] (1904).

Death of a Customer.—Payment after the death but before notice is valid: Rogerson v. Ladbroke, 1 Bing. 9[illegible]

(1822). It has been held in England that after the death of a partner, the surviving partner may draw cheques upon the partnership account: Backhouse v. Charlton, 8 Ch. D. 444 (1878). In Quebec the death of a partner terminates the partnership, and also the right of the survivors to act for the firm, in the absence of a special agreement to the contrary: C. C. 1892, 1897. § 74.

A cheque given as a donatio mortis causa must be presented or negotiated before notice of the death of the donor in order to charge his estate: Hewitt v. Kaye, L. R. 6 Eq. 198 (1868); Beak v. Beak, L. R. 13 Eq. 489 (1872); Rolls v. Pearce, 5 Ch. D. 730 (1877). But see Colvile v. Flanagan, 8 L. C. J. 225 (1864); and Clement v. Cheesman, 27 Ch. D. 631 (1884).

Crossed Cheques.

Sections 75 to 81, inclusive, treat of crossed cheques. They are copied from the Imperial Act, with the substitution of "bank" for "banker," as private bankers are not recognized by the Canadian Act. The practice of crossing cheques did not prevail in Canada before the Act, and it is not likely to be generally adopted now, as the drawer can protect himself by making a cheque payable to order, since our Parliament refused to adopt section 60 of the Imperial Act, which relieves a bank from responsibility for the genuineness or authorization of the indorsement on cheques drawn upon it.

The practice is a comparatively modern one in England, and is another illustration of the elasticity of the law merchant by which a custom obtains for itself judicial sanction or legislative recognition. From the report of Stewart v. Lee, 1 M. & M. at p. 161 (1828), it would appear that the effect of crossing was not then fully settled. It is described in Boddington v. Schlenker, 4 B. & Ad. 752 ([illegible]) and in Bellamy v. Majoribanks, 7 Ex. at p. 402 ([illegible]). Baron Parke there gives a history of its origin and growth

§ 74. Crossed cheques.

The practice originated at the London clearing house, the clerks of the different bankers who did business there having been accustomed to write across the cheques the names of their employers, so as to enable the clearing house clerks to make up the accounts. It afterwards became a common practice to cross cheques which were not intended to go through the clearing house at all. Baron Parke held that this had nothing to do with the restriction of negotiability, and formed no part of the cheque, and in no way altered its effect; but was a protection and safeguard to the owner, as, if a banker paid it otherwise than through another banker, the circumstance of his so paying would be strong evidence of negligence in an action against him. See also Carlon v. Ireland, 5 E. & B. 765 (1856).

The first Imperial Statute recognizing crossings was passed in 1856. In Simmons v. Taylor, 2 C. B. N. S. 528 (1857), it was held that the crossing was not a material part of the cheque and a holder might erase it. The Act of 1858 was passed to overcome the effect of this decision. In Smith v. Union Bank of London, 1 Q. B. D. 31 (1875), a cheque crossed to a certain bank was stolen, and coming into the hands of a bona fide holder, he got it cashed through his own bank. The Court held that the Act of 1858 did not affect the negotiability of the cheque which had been indorsed by the payee. In Bobbett v. Pinkett, 1 Ex. D. 368 (1876), where the indorsement of the payee was forged, the banker was held liable for paying it otherwise than through the banker to whom it was specially indorsed. Then came the Act of 1876, which introduced the "not negotiable" crossing, which has been substantially reproduced in the Act of 1882 and the present Act.

Although the crossing of cheques was not recognized in practice or in legislation in Canada, yet the Imperial Act, making the obliteration or alteration of the crossing a felony, was copied into our Forgery Act of 1869, and became section 31 of R. S. C. chap. 165. Even the words "and company" and "banker" were retained. In the Criminal Code, 1892,

by section 423 (A) (r), the forgery of a cheque renders the person found guilty liable to imprisonment for life, but obliterating or altering the crossing is not made a special offence. § 75.

The practice of crossing cheques has not been adopted in the United States: 2 Daniel, § 1585a.

75. Where a cheque bears across its face an addition of— General crossing defined

(a) The word "bank" between two parallel transverse lines, either with or without the words "not negotiable"; or—

(b) Two parallel transverse lines simply, either with or without the words "not negotiable":

That addition constitutes a crossing, and the cheque is crossed generally:

2. Where a cheque bears across its face an addition of the name of a bank, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that bank. Imp. Act, s. 76. Special crossing.

As already stated, this part of the Act does not apply to cheques on private bankers, nor can a cheque on an incorporated bank be crossed in favor of a private banker, or if crossed generally, be presented through him.

Where the drawer of a cheque made it payable to the order of M., and crossed it "Account of M., National Bank," and gave it to M., who indorsed it to the National Bank, it was held that the bank could recover from the drawer, for these words, even assuming that section 8 of the Bills of Exchange Act applies to cheques, do not prohibit transfer, or indicate an intention that it should not be transferred; and that probably the only way to make a cheque not transferable would be to comply with the provisions of this section. National Bank v. Silke, [1891] 1 Q. B. 435

§ 76.

Crossing by drawer.

76. A cheque may be crossed generally or specially by the drawer:

General or special.

2. Where a cheque is uncrossed, the holder may cross it generally or specially:

May be varied.

3. Where a cheque is crossed generally, the holder may cross it specially:

Words may be added.

4. Where a cheque is crossed generally or specially, the holder may add the words "not negotiable:"

Re-crossing for collection.

5. Where a cheque is crossed specially the bank to which it is crossed may again cross it specially to another bank for collection:

Crossing by bank.

6. Where an uncrossed cheque, or a cheque crossed generally, is sent to the bank for collection, it may cross it specially to itself: Imp. Act, s. 77,

The "holder" of a cheque is the payee or indorsee if it is payable to order, provided he is in possession of it. If it is payable to bearer he is the person who is in possession of it. Bank here means an incorporated bank doing business in Canada.

Uncrossing crossed cheque.

7. A crossed cheque may be re-opened or uncrossed by the drawer writing between the transverse lines, and initialling the same, the words "pay cash."

This is not in the Imperial Act, but it is in accordance with English custom: Chalmers, p. 259. It is the drawer alone who can obliterate the crossing. See the next section.

Crossing a material part of cheque.

77. A crossing authorized by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing. Imp. Act, s. 78.

A material alteration voids a cheque except as to a party who has made, authorized or assented to it, and except as to indorsers subsequent to the alteration: sec. 63. § 77.

In England an unauthorized obliteration or alteration is forgery: 24-25 Vict. chap. 98, secs. 25 and 39. This was copied in our Canadian criminal law, and became R. S. C. chap. 165, sec. 31; but it is the English crossing that is there referred to, and declared to be a felony. That section is not applicable to the crossing authorized by the Canadian Act.

If the obliteration, addition or alteration does not amount to forgery, it would come under section 138 of the Criminal Code, 1892, which makes any person who, without lawful excuse, disobeys an Act of Parliament, guilty of an offence, and liable to one year's imprisonment.

78. Where a cheque is crossed specially to more than one bank, except when crossed to another bank as agent for collection, the bank on which it is drawn shall refuse payment thereof: Duties of bank as to crossed cheques.

2. Where the bank on which a cheque so crossed is drawn, nevertheless pays the same, or pays a cheque crossed generally otherwise than to a bank, or if crossed specially, otherwise than to the bank to which it is crossed, or to the bank acting as its agent for collection, it is liable to the true owner of the cheque for any loss he sustains owing to the cheque having been so paid: Provided, that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this Act, the bank paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall Liability for improper payment. Proviso. Alteration not apparent.

§ 78. the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a bank or to the bank to which the cheque is or was crossed, or to the bank acting as its agent for collection, as the case may be. Imp. Act, s. 79.

The first clause would prevent the thief or finder of a specially crossed cheque, or any holder subsequent to him, from crossing the cheque a second time and so getting paid through another bank.

Before acceptance there is no privity between the holder of a cheque and the bank upon which it is drawn; but sub-section 2 gives a remedy to the true owner against a bank which improperly pays a crossed cheque.

Protection to bank and drawer where cheque is crossed.

79. Where the bank, on which a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a bank, or, if crossed specially, to the bank to which it is crossed, or to a bank acting as its agent for collection, the bank paying the cheque, and if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof. Imp. Act, s. 80.

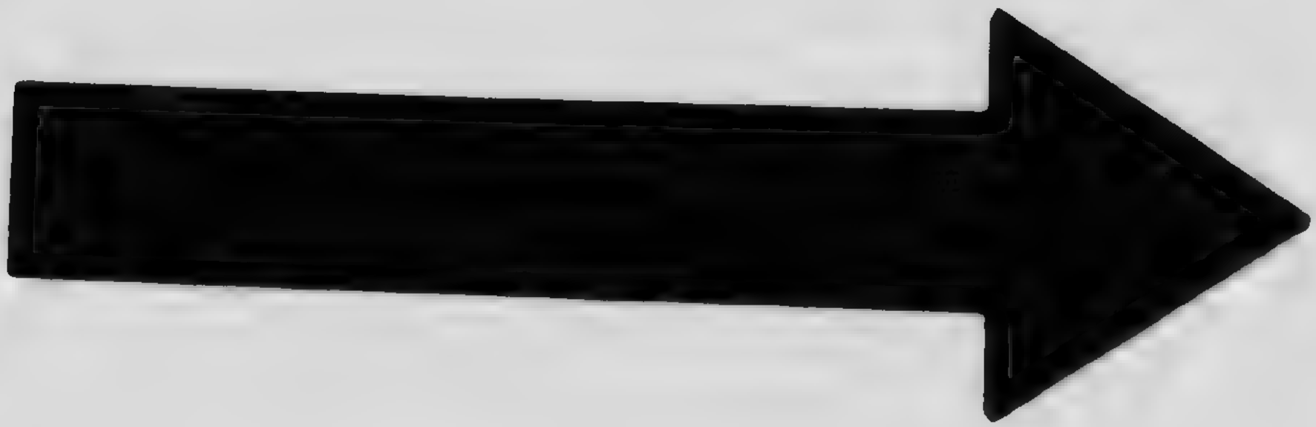
This section gives to a bank on which a cheque is drawn the protection, in the case of a crossed cheque, which our Parliament refused to give it as to demand bills and ordinary cheques by striking out of the bill the clause corresponding to section 60 of the Imperial Act. On the other hand, it furnishes to the other parties to a cheque a strong reason

for objecting to the crossing of a cheque. If a crossed cheque which has not been made "not negotiable" is lost or stolen before it reaches the hands of the payee, and the bank pays it in good faith and without negligence even upon a forged indorsement, the drawer has no recourse against the bank which has paid or the bank which has collected, but can only look to the guilty party or some subsequent holder. See Ogden v. Benas, L. R. 9 C. P. 513 (1874); Patent Safety Gun Cotton Co. v. Wilson, 49 L. J. C. P. 713 (1880): sec. 81. If it is lost or stolen after reaching the hands of the payee, and is paid in like manner, the drawer is released; but the payee, indorsee, or holder who has lost the bill, or from whom it has been stolen, is in the same position as the drawer in the case just mentioned. 79. Disadvantage to loser of crossed cheque.

The payee of a crossed cheque specially indorsed it to plaintiffs and posted it to them. A stranger having obtained possession of it during transmission obliterated the indorsement to plaintiffs, and having specially indorsed it to himself, presented it at defendants' bank and requested them to collect it for him. They did so and handed him the money. In an action for conversion defendants were held liable for the amount of the cheque: Kleinwort v. Comptoir National d'Escompte, [1894] 2 Q. B. 157.

A cheque on defendants' bank in London in favor of plaintiff was crossed generally. The indorsement was forged, and a person purporting to be the last indorsee, and not a customer of the bank, presented it at defendants' bank in Paris and was paid. It was forwarded to London and credited to the Paris branch. It was held that English law governed and that the bank was liable to plaintiff: Lacave v. Credit Lyonnais, [1897] 1 Q. B. 148.

80. Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which had the person from whom he took it. Imp. Act, s. 81. Effect of crossing on holder.



MICROCOPY RESOLUTION TEST CHART

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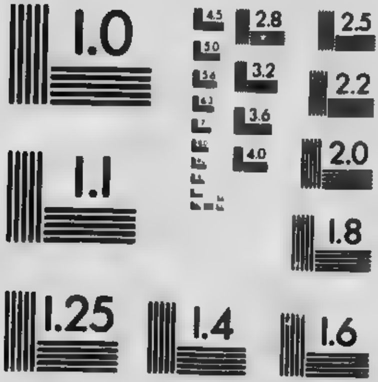


§ 80. Making a cheque "not negotiable" puts it on the same footing as an overdue bill, so that any holder takes it subject to the equities attaching to it, and no person can become a holder in due course. If such a cheque should be lost or stolen the person receiving the money from the collecting bank would be liable in any event.

Where a cheque crossed "not negotiable" was drawn in favor of a firm, and one partner S., in fraud of plaintiff, his co-partner, indorsed it to defendant, who got it cashed for S., defendant was held liable to the co-partner, who under the partnership articles was entitled to the cheque: Fisher v. Roberts, 6 T. L. R. 354 (1890). See National Bank v. Silke, [1891] 1 Q. B. 435.

Protection to collecting bank.

81. Where a bank, in good faith and without negligence, receives for a customer payment of a cheque crossed generally or specially to itself, and the customer has no title, or a defective title thereto, the bank shall not incur any liability to the true owner of the cheque by reason only of having received such payment. Imp. Act, s. 82.

Section 79 relieves the bank on which the crossed cheque is drawn; this section, the bank which collects it. If it be indorsed "per proc." and the banker makes no inquiry as to the authority to so indorse, this may be negligence: Bissel v. Fox, 53 L. T. N. S. 193; 1 T. L. R. 452 (1885). See Mathiessen v. London & County Bank, 5 C. P. D. 7 (1879); Bennett v. London & County Bank, 2 T. L. R. 765 (1886). For an instance of negligence on the part of bankers disentitling them to the benefit of this section, see Hannan v. Armstrong, 16 T. L. R. 236 (1900).

Where a customer's account is overdrawn, a banker collecting a crossed cheque and placing the proceeds to his credit, is within the section: Clarke v. London & County Banking Co., [1897] 1 Q. B. 552.

§ 81.

Two banks credited a customer with the amounts of cheques as soon as they were handed in to his account and allowed him to draw against the amounts so credited before the cheques were cashed. It was held that the protection of this section did not apply to such a case, as the banks received the amount for themselves and not for the customer: Capital & Counties Bank v. Gordon, and London City & Midland Bank v. Gordon, [1903] A. C. 240; Brown v. National Bank, 18 T. L. R. 669 (1902).

Where the only transaction between an individual and a bank is the collection of a crossed cheque, such individual is not a customer of the bank within this section: Matthews v. Brown, 10 T. L. R. 386 (1894); 63 L. J. Q. B. 494; Lacave v. Credit Lyonnais, [1897] 1 Q. B. 148.

To make a person a "customer of a bank within the meaning of this section there must be some sort of account, either a current or a deposit account, or some similar relation. A person obtained from the drawer a cheque crossed generally and marked "not negotiable," and took it to a bank which, at his request, paid part of the amount of the cheque into the account of one of its customers and handed the balance to him. After the bank had received payment of the cheque from the bank on which it was drawn the fraud was discovered and the drawer sued the collecting bank. The latter received the payment in good faith and without negligence. and had for years been cashing cheques for the same person in a like manner, but he had no account or pass-book with them. Held that he was not a "customer" and the collecting bank was not protected: Great Western Ry. Co. v. London & County Banking Co., [1901] A. C. 414.

PART IV.

PROMISSORY NOTES.

Only seven sections of the Act, 82 to 88, are devoted specially to promissory notes. As will be seen from section 88, however, most of the provisions of the Act in Part II. relating to bills of exchange. except those connected with their acceptance, apply also to promissory notes.

Promissory note defined.

82. A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer: Imp. Act, s. 83 (1).

This definition of a promissory note is an adaptation of that of a bill of exchange, given in section 3, with the necessary modifications.

The definition in the Civil Code, Quebec, is given in Art. 2344 as follows:—" A promissory note is a written promise for the payment of money at all events and without any condition." The French Code de Commerce does not define a note, but, after specifying what articles apply to notes as well as to bills, says, Art. 188: " A promissory note is dated. It specifies the sum to be paid. the name of the person to the order of whom it is made, the time at which payment must be made, the value furnished in money, goods, account. or otherwise."

The definition makes no change in the law as to what is a promissory note, except that in Nova Scotia and New Brunswick notes payable otherwise than in money, which.

under provincial Acts, were, in certain respects, placed on the same footing as promissory notes payable in money, and were generally called promissory notes, will no longer be so considered. A note payable to a specified person and not to his order, or to bearer, was considered a promissory note before the Act, but was not negotiable. It is now negotiable: sections 8 and 88.

"**Unconditional Promise.**"—The maker of a note is deemed to correspond with the acceptor of a bill: section 88. A bill is an unconditional order, but the acceptance may be conditional: section 19. There is consequently this difference, that while the undertaking of the acceptor may be only conditional, that of the maker of a note is unconditional, and corresponds with the position of an unconditional acceptor.

"**In Writing.**"—As to what is a writing, see p. 33.

"**One Person to Another.**"—While there are three parties to a bill of exchange, the drawer, the drawee, and the payee, there are only two necessary parties to a promissory note, the maker and the payee.

"**Signed.**"—As to what is a signature under the Act, see pp. 36 and 37. Where a person signs, as agent or in a representative character, it is often a matter of dispute whether he is personally liable. See pp. 150-7.

"**On Demand,**" **etc.**—A note is payable on demand which is expressed to be so payable, or in which no time for payment is expressed: sections 10 and 88. A note is payable at a fixed or determinable future time which is expressed to be payable at a fixed period after date, or on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening is uncertain: sections 11 and 88. See notes and illustrations under the former of these sections.

"**A Sum Certain in Money.**"—See pp. 38 to 41; also section 9 and the notes and illustrations thereunder.

§ 82. **"Specified Person."**—The person to whom or to whose order a note is made payable is called the payee. If the note is not payable to bearer, he should be named or otherwise indicated with reasonable certainty: section 7. See p. 41.

"Bearer."—Most of the companies incorporated under Imperial, Dominion or Provincial Charters are prohibited from issuing a note payable to bearer. See pp. 124 to 129; also 54 Vict. c. 35 (Que.). All persons except chartered banks are prohibited under a penalty of $400 from issuing notes payable to bearer, intended to circulate as money: Bank Act, 53 Vict. c. 31, s. 60.

No particular form of words is required to constitute a valid note, provided the instrument meet the requirements of the definition: Hall v. Bradbury, 1 Rev. de Leg. 180 (1845); Hooper v. Williams, 2 Ex. at p. 20 (1848). But a promissory note, as between the original parties at least, is something which they intend to be a promissory note: Sibree v. Tripp, 15 M. & W. at p. 29 (1846); Robert v. Charbonneau, Q. R. 22 S. C. 406 (1902). If an instrument is ambiguous and it is uncertain whether it was meant to be a bill or note, the holder may treat it as either at his option: Edis v. Bury, 6 B. & C. 433 (1827); Fielder v. Marshall, 9 C. B. N. S. 606 (1861). The construction most favorable to the validity of the instrument will be adopted: Mare v. Charles, 5 E. & B. at p. 981 (1856).

If an instrument is in the form of a bill, and the drawer and the drawee are the same person, or the drawee is a fictitious person or one not having capacity to contract, it may be treated as a note by the holder: section 5, s-s. 2.

ILLUSTRATIONS.

See illustrations ante pp. 39, 43, 44, 55, 56, 63, and 79.

The following instruments have been held not to be valid promissory notes:—

1. "Three months after date, pay to the order of T. £228, for value received." Held not to be a note, for want of promise, and not a bill, because addressed to no drawee: Forward v. Thompson, 12 U. C. Q. B. 108 (1853).

2. An instrument in the form of a note but under the seal of the maker: Wilson v. Gates, 16 U. C. Q. B. 278 (1858). § 82.

3. An instrument in the form of a note payable to bearer, but with a condition: Campbell v. McKinnon, 18 U. C. Q. B. 612 (1859).

4. "Four months after date I promise to pay to W. H. or order $1,264, value received. This note to be held as collateral security. S. J. M.": Hall v. Merrick, 40 U. C. Q. B. 566 (1877); Sutherland v. Patterson, 4 O. R. 565 (1884).

5. An instrument in the form of a promissory note, but with a blank left for the payee's name and not filled up: Reg. v. Cormack, 21 O. R. 213 (1891).

6. "To George Trimble: We hereby undertake to pay to the executors of the late J. D. King the sum of $375 on a mortgage they hold against Royal Hotel property, Streetsville," delivered to Trimble, is not a promissory note in his hands: Trimble v. Miller, 22 O. R. 500 (1892).

7. A letter acknowledging receipt of money "as a loan, subject to be returned when demanded, with interest": Whishaw v. Gilmour, 6 L. C. J. 319 (1862).

8. A receipt in the following form:—"Received from Mrs. A. a loan of $800, to be returned when required": DeSola v. Ascher, 17 R. L. 315 (1889).

9. Under C. C. Arts. 2344 and 2345, before the Act of 1890, a promissory note to the order of the maker, and not indorsed by him: Trenholme v. Coutu, Q. R. 2 Q. B. 387 (1893).

10. An indenture under the hands and seals of the parties; the form shewing that the parties did not intend the instrument to be a promissory note: Zampino v. Blanchieri, Q. R. 24 S. C. 265 (1903).

The following have been held to be valid notes:—

1. A church subscription list held to be the several note of each subscriber for the sum opposite his name: Thomas v. Grace, 15 U. C. C. P. 462 (1865).

2. A promise to pay in cash or goods at the option of the holder: McDonell v. Holgate, 2 Rev. de Leg. 29 (1818); Hosstatter v. Wilson, 31 Barb. (N. Y.) 307 (1862); Dinsmore v. Duncan, 57 N. Y. at p. 573 (1874).

3. An obligation before a notary to pay a certain sum of money without condition: Aurele v. Durocher, 5 R. L. 165 (1873).

§ 82. 4. Municipal debentures under C. S. L. C. c. 25, payable to bearer: Eastern Townships' Bank v. Compton, 7 R. L. 446 (1871); Macfarlane v. St. Cesaire, M. L. R. 2 Q. B. 160 (1886).

5. "This is to certify that I., N. K., hereby agree and bind myself to pay to M., or order, $2,000, for all the space from date to close of navigation he has on the A. & B. line of steamers: $1,000 I now pay cash, and $1,000 I bind and pledge myself to pay to M. or order, on or about Nov. 15th, 1883. It is understood that this amount of $2,000 is paid for premium over and above the rate of freight to be paid for said steamers to agents and shipowners."—Held, to be a negotiable note: Kennedy v. Exchange Bank, 30 L. C. J. 266 (1886).

6. An instrument in the form of a note written at the foot of a letter which set out the consideration, etc. The fact of the payee having cut off the letter before suing on the note was not a mutilation or alteration of the note: Palliser v. Lindsay, M. L. R. 6 Q. B. 311 (1890).

7. A note which stated that it was given for a binder which was to remain the property of the payee until paid for, and that they were to provide repairs, etc.: Merchants' Bank v. Dunlop, 9 Man. 623 (1894); Chicago Railway Equipment Co. v. Merchants' Bank, 136 U. S. 269 (1890); Choate v. Stevens, 116 Mich. 28 (1898). Contra. Dominion Bank v. Wiggins, 21 Ont. A. R. 275 (1894); Imperial Bank v. Bromish, 16 C. L. T. 21 (1895); Hamilton v. Gillies, 12 Man. 495 (1899); Prescott v. Garland, 34 N. B. 291 (1897).

8. A note worded as follows: "On demand ——— months after date, I promise to pay A. B. or order," etc.: Commercial Bank v. Allan, 10 Man. 330 (1894).

9. "I have received the books, which with cash overpaid, amounts to £80, which I will pay in two years": Wheatley v. Williams, 1 M. & W. 533 (1836).

10. "I promise to pay S. or order, 3 months after date, £100 as per memorandum of agreement": Jury v. Barker, E. B. & E. 459 (1858).

11. "Received from A. B. £30, payable on demand": McCubbin v. Stephen, 28 Jurist (Sc.) 618 (1856).

12. "We promise to pay one day after demand £500," is a promissory note although no payee is named. Having been delivered to plaintiff as a promissory note, it may be treated as if payable to bearer: Daun v. Sherwood, 11 T. L. R. 211 (1895).

Bank Notes.—Bank notes are promissory notes payable to bearer on demand. They may be issued only by chartered banks, and no note shall be for less than five dollars, or for any sum that is not a multiple of five dollars: 53 Vict. c. 31, s. 51 (Can.). They circulate as cash, are not deemed to be overdue, and are not discharged by coming into the hands of the bank, but may be re-issued. They are not subject to the statutes of limitation or prescription, at least until after demand and dishonor. § 82.

Dominion Notes.—These notes, issued under R. S. C. c. 31, are in form promissory notes payable on demand, but they do not strictly come within the definition of this section, as the Dominion of Canada, the maker, is not a "person" under the Interpretation Act. They have all the qualities of negotiable notes and bank notes, and are besides a legal tender.

Bon or I. O. U.—There were conflicting decisions in England as to whether an I. O. U. was a negotiable instrument. It is now well settled that if the instrument is a simple I. O. U. and contains no promise to pay, it is a mere acknowledgment of the debt, and is not negotiable: Gould v. Coombs, 1 C. B. 543 (1845); Fessenmayer v. Adcock, 16 M. & W. 449 (1847); Byles, p. 34. If, however, it contains a promise to pay it is a note, and the following was held to be sufficient: "1[illegible]th Oct., 1831, I. O. U. £20. to be paid on the 22nd inst. W. B.": Brooks v. Elkins, 2 M. & W. 74 (1836).

In Canada the decisions have not been uniform. In Palmer v. McLennan, 22 U. C. C. P. 565 (1873), the following was held not to be a note: "Good to Mr. Palmer for $850 on demand." In Gray v. Worden, 29 U. C. Q. B. 535 (1870), "Due J. G. or bearer $482, payable in 14 days," was held to be a sufficient promise to make it a note.

In Quebec a simple bon, "Good on demand," has been recognized as a negotiable note: Hall v. Bradbury, 1 Rev. de Leg. 180 (1845); Beaudry v. Laflamme, 6 L. C. J. 307 (1862); Cridiford v. Bulmer, M. L. R. 4 Q. B. 293 (1886);

§ 82. Desy v. Daly. Q. R. 12 S. C. 183 (1897); but not a mere certificate of indebtedness: Dasylva v. Dufour, 16 L. C. R. 294 (1866).

In France and most of the United States these instruments are recognized as negotiable, and the introduction of such words as "payable," "good to," "order," "bearer," "demand," or a due date, have been accepted as sufficient evidence of a promise to pay, or that the instrument should be negotiable. See Sackett v. Spencer, 29 Barb. (N. Y.) 180 (1859); Hussey v. Winslow, 59 Me. 170 (1870); Franklin v. March, 6 N. H. 364 (1833); Kimball v. Huntington, 10 Wend. (N. Y.) 675 (1833).

It is probable that the change in the law of Canada by which notes payable to a person, without "order" or "bearer," are made negotiable, will lead to more general recognition of these bons as negotiable instruments.

Indorsement by maker.

2. An instrument in the form of a note payable to maker's order is not a note within the meaning of this section, unless and until it is indorsed by the maker: Imp. Act, s. 83 (2).

When such a note is indorsed in blank it becomes a note payable to bearer: Burns v. Harper, 6 U. C. Q. B. 509 (1849); Wallace v. Henderson, 7 U. C. Q. B. 88 (1849); Ennis v. Hastings, 9 N. B. (4 Allen) 482 (1860), Hooper v. Williams, 2 Ex. 13 (1848); Brown v. De Winton, 6 C. B. 336 (1848); Masters v. Baretto, 8 C. B. 433 (1849). If indorsed specially it becomes a note payable to the indorsee: Gay v. Lander, 6 C. B. 336 (1848); Moses v. Lawrence County Bank, 149 U. S. 298 (1892).

Collateral pledge in note.

3. A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof: Imp. Act, s. 83 (3).

This sub-section is a modification of the rule in section 3, that an instrument which orders anything to be done in addition to the payment of money, is not a bill. See Wise v. Charlton, 4 A. & E. 786 (1836); Fancourt v. Thorne, 9 Q. B. 312 (1846). § 82.

An instrument in the form of a promissory note signed by a principal and surety had this clause added: "Time may be given to either without the consent of the other, and without prejudice to the rights of the holder to proceed against either party, notwithstanding time given to another." Held, that this did not prevent its being a promissory note. Yates v. Evans, 61 L. J. Q. B. 446; 66 L. T. N. S. 532 (1882).

An instrument providing for the payment of money by instalments, the whole to become due on default of payment of one instalment, had this clause added: "No time given to, or security taken from, or composition or arrangements entered into, with either party hereto shall prejudice the rights of the holder to proceed against any other party." Held, that this was a good promissory note. Yates v. Evans, supra, approved; Kirkwood v. Smith, [1896] 1 Q. B. 582, overruled: Kirkwood v. Carroll, [1903] 1 K. B. 531.

When a note on its face contains a statement that it is given as collateral security, it is not a promissory note: Hall v. Merrick, 40 U. C. Q. B. 566 (1877); Sutherland v. Patterson, 4 O. R. 565 (1884).

The contrary has been held in Australia. In Lipscomb v. Matton, 15 N. S. W. R. (Law) 362 (1894), it was decided that the words, "this being collateral security to a mortgage given," etc., did not import a condition that the promissory note was only payable in the event of the mortgage not being paid.

There is a conflict of authority as to whether lien notes, that is, notes which contain a statement that they have been given for an article which is to remain the property of the vendor until the note is paid, are negotiable instruments or not. See ante p. 410, Ill. 7.

§ 83. Where collateral security is given with a note, the right to such collateral goes with the note: Central Bank v. Garland, 20 O. R. 142 (1890). See Cochrane v. Boucher, 3 O. R. at p. 172 (1883). This is the law in France: Nouguier, § 715.

The creditor has a right to hold the securities even after the remedy on the note is barred by the Statute of Limitations: Wiley v. Ledyard, 10 Ont. P. R. 182 (1883).

Inland and foreign. 4. A note which is, or on the face of it purports to be, both made and payable within Canada, is an inland note: any other note is a foreign note. Imp. Act, s. 83 (4).

The Imperial Act uses the words "British Islands."

If dated abroad and payable in Canada, a note would still be an inland note if actually made or issued in Canada. On the other hand, if dated in Canada and payable there, it would be an inland note although actually issued abroad. The distinction is of consequence for the purposes of protest. An inland note need not be protested except in Quebec, notice of dishonor being sufficient to bind indorsers in the other provinces: sections 51, 88. To bind the indorsers of a foreign note protest is necessary in any part of Canada: section 88, s-s. 4.

A note dated in Halifax, N.S., and payable there, is an inland note although made in France: Merchants' Bank v. Stirling, 13 N. S. (1 R. & G.) 439 (1880).

Delivery necessary. **83.** A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer. Imp. Act, s. 84.

It becomes a note on delivery to the second party to it. Delivery is the transfer of possession, actual or constructive, from one person to another: section 2 (*f*). The nature of the delivery necessary to give effect to a note is set out in section 21.

See Chapman v. Cottrell, 3 H. & C. 865 (1865).

84. A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenor: Imp. Act, s. 85 (1). **84.** Joint and several notes.

This section is likely to bring up some interesting questions on account of the difference between the law of Quebec and that of the other provinces as to the nature of a joint contract, or joint liability, as distinguished from that which is joint and several.

Under the French law, in force in Quebec, where several persons are jointly liable for a debt, each of them is liable for an equal fractional part to the creditor, whatever may be their respective rights as against each other. Thus, if two are jointly bound, each is liable for one-half; if there are three, each is liable for one-third, and so on; and no one of them by the death of his co-debtor or otherwise becomes liable for more. The advantage to a creditor in having a joint contract instead of so many separate contracts is that he may sue all in one action, obtaining a separate condemnation of each for his equal share. See Pothier on Obligations, No. 165; 17 Laurent, Nos. 274, 280. An obligation is presumed to be joint, unless expressly declared to be joint and several. This rule does not apply to commercial transactions, where the presumption is in favor of the liability being joint and several: C. C. Art. 1105. Joint liability in Quebec.

Under English law, on the other hand, each joint debtor is liable to the creditor for the whole. If one dies, his representatives are not liable for any part to the creditor. If the creditor does not sue all who are alive and in the country, those who are sued might, upon a plea in abatement, under the old system of pleading, or by a motion under the Judicature Act, have proceedings stayed, until the living joint debtors who are in the country are made parties. A judgment taken against some of the joint debtors frees the others from all liability: King v. Hoare, 13 M. & W. 494 (1844); Kendall v. Hamilton, 4 App. Cas. 504 (1879); Hammond In the other Provinces.

§ 84. v. Schofield, [1891] 1 Q. B. 453; Hoare v. Niblett, [1891] 1 Q. B. 781; Toronto v. Maclaren, 14 Ont. P. R. 89 (1890); McDonald v. McGillis, 33 N. S. 244 (1900); Leake on Contracts, pp. 295-6.

Joint liability.

In Ontario by R. S. O. c. 129, s. 15, and in Manitoba by R. S. M. c. 170, s. 61, the common law rule as to joint debtors has been modified by providing that in case one or more of them dies his or their representatives may be proceeded against as if the contract had been joint and several.

If a note is on its face "joint," and not joint and several, the law would differ as above, according to whether it is a Quebec note or not. The note would be interpreted according to the law of the place where it was made: section 71 (b); that is, where it was delivered to the payee or bearer: section 83.

In Cook v. Dodds, 6 O. L. R. 608 (1903), the representatives of a deceased joint maker of a note were sued. They claimed that the liability being joint did not survive the death, and that a provincial statute could not vary the Bills of Exchange Act. It was held that the Dominion Act did not deal with the consequences which flow from a joint or joint and several liability; but that this was to be determined by the law of the province where the liability was sought to be enforced, and that R. S. O. c. 129, s. 15, above referred to, governed.

In the province of Quebec in the case of Crepeau v. Beauchesne, Q. R. 14 S. C. 495 (1898), one of two joint makers was held liable for the whole amount of a note, as having incurred a joint liability as understood in English law. In a later case, Noble v. Forgrave, Q. R. 17 S. C. 234 (1899), it was held that section 8 of the amending Act of 1891 had introduced into Quebec the law of England on this point, modifying, as to bills and notes, the provisions of Article 1105 of the Civil Code, which declares that in commercial matters the liability is presumed to be joint and several. The two makers were consequently condemned jointly, that is, each for one-half. Before the Act the de-

cisions in Quebec on the point were conflicting. After the abolition of the distinction between traders and non-traders with regard to negotiable notes, it was generally considered that every negotiable note was a commercial transaction, and that under Art. 1105 C. C., the makers were jointly and severally liable: Perrault v. Bergevin, 14 R. L. 604 (1886). In Malhiot v. Tessier, 2 R. L. 625 (1870), however, it was held that two farmers who had signed a note were liable only jointly, and this doctrine has been confirmed by Drouin v. Gauthier, cited below. § 84.

Under English law, a note signed by several makers, not partners, which reads "we promise," is joint: Byles, p. 8; Chalmers, p. 271; 1 Daniel, § 94; Barnett v. Juday, 38 Ind. 86 (1871). The liability of partners is also joint, but the law gives a remedy against the assets of a deceased partner, thus modifying the general law in this respect: Kendall v. Hamilton, 4 App. Cas. 504 (1879).

In the Province of Quebec partners in a civil or non-commercial partnership, are jointly liable for the debts of the firm in equal shares, although their shares in the partnership are unequal. In commercial partnerships they are liable jointly and severally: C. C. Art. 1854.

In Drouin v. Gauthier, Q. R. 12, Q. B. 442 (1903), the Superior Court condemned the members of a firm of advocates jointly and severally on a firm note, under Art. 1105, C. C., on the ground that it was a commercial matter. This was reversed in appeal, on the ground that a legal partnership is a civil not a commercial partnership, and that under section 23 (*b*) the firm signature was equivalent to the signature of all the partners. Their liability was consequently held to be merely joint and not joint and several.

Joint and several liability.

A "joint and several" liability is substantially the same in English and French law. Each of the debtors is liable for the full amount, and on his death his liability descends to his representatives. Payment by one discharges the liability of the others to the creditor. The debtor who has

§ 85. paid may have his right of contribution against his co-debtors. A judgment against one maker is no bar to proceedings against the others: Re Davison, 13 Q. B. D. at p. 53 (1884).

If one or more are sued but not all, those who are sued have no right to delay the plaintiff by having the others called in: Durocher v. Lapalme, M. L. R. 1 S. C. 494 (1885); Block v. Lawrance, ibid. 2 S. C. 279 (1886). Contra, Beaulieu v. Demers, 5 R. L. 244 (1874); Demers v. Harvey, Q. R. 5 S. C. 1 (1893).

Where one of two joint makers of a note signs for the accommodation of the other, their relation is that of principal and surety. and the prescription of five years does not apply: Cullen v. Bryson, Q. R. 2 S. C. 36 (1892).

As to number.

2. Where a note runs "I promise to pay," and is signed by two or more persons, it is deemed to be their joint and several note. Imp. Act, s. 85 (2.)

This has long been recognized as law in England: March v. Ward, Peake, 177 (1792); Clark v. Blackstock, Holt N. P. 474 (1816). And in the United States: Monson v. Drakely, 40 Conn. 552 (1873); Hemmenway v. Stone, 7 Mass. 58 (1810); Partridge v. Colby, 19 Barb. (N. Y.) 248 (1855); Ely v. Clute, 19 Hun (N. Y.) 35 (1879). As also in Ontario: Creighton v. Fretz. 26 U. C. Q. B. 627 (1867).

Note payable on demand.

85. Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement: if it is not so presented, the indorser is discharged; if however, with the assent of the indorser, it has been delivered as a collateral or continuing security, it need not be presented for payment so long as it is held as such security:

2. In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case: Imp. Act, s. 86 (1) (2). § 85. Reasonable time.

The last clause of the first sub-section is not in the Imperial Act, which ends with the word "discharged." The added part, however, agrees with the law as laid down in the English cases.

A note is payable on demand which is expressed to be payable on demand, or on presentation, or in which no time for payment is expressed, or which has been indorsed when overdue: sections 10 and 88.

Section 45, s-s. 2 (*b*), contains similar provisions as to presenting a bill for payment. As to what is "a reasonable time," see ante, p. 234.

"A promissory note payable on demand is often intended to be a continuing security, it is quite unlike a cheque which is intended to be presented speedily": per Parke, B., in Brooks v. Mitchell, 9 M. & W. at p. 15 (1841). See also Cripps v. Davis, 12 M. & W. 165 (1843); Bartrum v. Caddy, 9 A. & E. 275 (1838); Leith Banking Co. v. Walker, 14 Sess. Cas. 332 (1836); Morgan v. United States, 113 U. S. 501 (1884).

Where a demand note is payable with interest, this has been considered as an indication that an early presentment was not contemplated: Beaudry v. Renaud, 8 R. J. 490 (1902); Thorne v. Scovil, 4 N. B. (2 Kerr) 557 (1844); Commercial Bank v. Allan, 10 Man. 330 (1894); Vreeland v. Hyde, 2 Hall (N. Y.) 463 (1829); Seaver v. Lincoln, 21 Pick. (Mass.) 267 (1838); Merritt v. Todd, 23 N. Y. 28 (1861); Parker v. Stroud, 31 Hun (N. Y.) 578 (1884).

In the Chartered Mercantile Bank v. Dickson, L. R. 3 P. C. 574 (1871), it was held that where a demand note was indorsed Feb. 16th, but the payment of which was not contemplated at any immediate or specific date, but was intended as a continuing security, the indorser was not discharged by

85. the fact that it was not presented to the payee until December 14th.

In Dandurand v. Roulier, 33 L. C. J. 167 (1889), where defendant indorsed a demand note March 28th, 1885, for the maker, a friend whom he knew to be bankrupt, and the note was not protested until August 28th, 1888, the indorser was not discharged, as he was not injured but rather benefited by the delay, $50 having been paid September 27th, 1887, and the maker's circumstances having improved in the meantime. In this case interest was allowed only from demand.

In Merchants' Bank v. Whitfield, 2 Dorion, 157 (1881), where the directors of a joint stock company indorsed a note of the company, which was given to the bank as a continuing security, and it was held for twenty-seven months before payment was demanded, it was held that the indorsers were not discharged.

A demand note was made and indorsed on the 25th of August, 1891, but not presented for payment until the 7th of May, 1894. The indorser was held to be discharged by the delay: Banque du Peuple v. Denoncourt, Q. R. 10 S. C. 428 (1896).

In an action against the indorser of a demand note, a demand made three months after date was held not to be within a reasonable time under sec. 131 of the Negotiable Instruments Law and the law merchant: Merritt v. Jackson, 181 Mass. 69 (1902).

Defects without notice.

3. Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue. Imp. Act, s. 86 (3).

In this respect a note differs from a bill payable on demand or a cheque: section 36, s-s. 3.

For illustrations of the rule laid down in this sub-section, see Brooks v. Mitchell, 9 M. & W. 15 (1841); Glasscock v. Balls, 24 Q. B. D. at p. 15 (1889); Wethey v. Andrews, 3 Hill (N. Y.) 582 (1842); Losee v. Dunkins, 7 Johns. (N. Y.) 70 (1810); Herrick v. Wolverton, 41 N. Y. 581 (1870) Morey v. Wakefield, 41 Vt. 24 (1868); Rhodes v. Seymour, 36 Conn. 6 (1869). See also the cases in the last paragraph under the preceding sub-section.

A promissory note payable on demand with interest is a present debt, and "at maturity" as soon as given. A written renunciation thereof by the holder, in order to meet the requirements of section 61, must be an actual renunciation: and a paper written at the dictation of a dying man, that such note then mislaid should be destroyed when found, is not sufficient: Re George, Francis v. Bruce, 44 Ch. D. 627 (1890).

86. Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place. But the maker is not discharged by the omission to present the note for payment on the day that it matures. But if any suit or action is instituted thereon against him before presentation, the costs thereof shall be in the discretion of the court. If no place of payment is specified in the body of the note presentment for payment is not necessary in order to render the maker liable: Presentment of note for payment

The corresponding section in the Imperial Act, 87 (1), reads as follows:—"Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case presentment for payment is not necessary in order to render the maker liable." The clause was put into its present form in the Senate.

§ 86. The rule is now substantially the same as that regarding the presentment for payment of a bill of exchange. See section 45, s-s. 2 (*d*), and section 52.

In Prince Edward Island and Ontario, before the Act, a promissory note, like a bill of exchange in England, required to be presented at the place indicated, only in case the words "and not otherwise or elsewhere" were added: R. S. C. c. 123, ss. 9, 16. In Canada these words are not necessary in either bills or notes to require their presentment at the place named in the bill or note.

ILLUSTRATIONS.

1. In an action against the maker a plea of want of presentment is of no avail, unless he allege and prove he had funds at the place named to meet it: Mount v. Dunn, 4 L. C. R. 348 (1854); Rice v. Bowker, 3 L. C. R. 305 (1853). See O'Brien v. Stevenson, 15 L. C. R. 265 (1865).

2. Where action was brought on a note payable generally, five months after its maturity without demand of payment, and defendant pleaded and proved that he had money ready to pay it at maturity, plaintiff was refused costs: Mineault v. Lajoie, 9 R. L. 382 (1877).

3. Where action was brought on a demand note without presenting it for payment, and defendant paid the money into Court, plaintiff was condemned to pay costs: Archer v. Lortie, 3 Q. L. R. 159 (1877): Dorion v. Benoit, 2 L. N. 171 (1879): Lessard v. Genest, Ramsay A. C. 86 (1883).

4. The demand of payment of a note must be accompanied by a tender of it to the maker. Such demand of payment cannot be made publicly at the church door, immediately after divine service, either on a Sunday or a feast of obligation: De la Chevrotiere v. Guilmet, 9 L. N. 412 (1886).

5. Where a note was, in the body of it, made payable at a particular place, a presentment there after six years had elapsed, and just before action, was held to be sufficient to charge the maker: Miller v. Dodge, 23 N. S. 191 (1891).

6. A promissory note made payable at a particular place must be presented there in order to render the maker liable: Pigeon v. Moore, 23 N. S. 250 (1892); Clayton v. McDonald, 25 N. S. 446 (1893); Warner v. Simon-Kaye, 27 N. S. 340 (1894); Croft v. Hamlin, 2 B. C. 333 (1893). Contra. Merchants' Bank v. Henderson,

28 O. R. 369 (1897). It is a mere question of costs: Gordon v. Kerr, 25 Rettie (4th series) 570 (1898). § 86.

7. A note payable "to the order of S. Cunard & Co. at Halifax" is payable at a particular place, and comes under the above rule: Cunard v. Simon-Kaye, 27 N. S. 344 (1894).

8. A note payable at any particular place need not be presented for payment, as against the maker: Grant v. Heather, 2 Man. L. R. 201 (1885); Price v. Mitchell, 4 Camp. 200 (1815); Exon v. Russell, 4 M. & S. 507 (1816); Ramchurn v. Luchmeechund, 9 Moore P. C. at p. 70 (1854).

9. Where two joint makers stand to the knowledge of the holder in the relation to each other of principal debtor and surety, the latter is not released for a want of presentment and notice of dishonor: Gardner v. Shaver, (Man.) 13 C. L. T. 287 (1893).

10. The statement that a note was "duly presented" means that it was presented at the time and place at which it was made payable: Union Bank v. Wurtzburg, 9 B. C. 160 (1902).

11. The holder of a demand note may sue the maker without proving presentment or demand: Norton v. Ellam, 2 M. & W. at p. 464 (1837); Dodd v. Gill, 3 F. & F. 261 (1862).

12. In the case of a note payable on demand, the Statute of Limitations runs in favor of the maker from the date of the note: Norton v. Ellam, 2 M. & W. 461 (1837).

13. When a note is made payable at a particular place, presentment at that place is necessary to render the maker liable: Spindler v. Grellett, 1 Ex. 384 (1847); Sands v. Clarke, 8 C. B. 751 (1849); Vander Donckt v. Thellusson, 8 C. B. 812 (1849).

14. Across the face of a note there was written the following: "Payable at the London and Provincial Bank," which was signed by the maker. Held, that the note was not "in the body of it" made payable at a particular place: Stevenson v. Brown, 18 T. L. R. 268 (1902).

If the maker had funds at the place of payment on the day of maturity, and they were left there and finally lost through the neglect of the holder to present the note, as, for instance, by the failure of a bank, the maker would be discharged, at least to the extent of the loss.

The last clause would appear not to give the Court any discretion as to costs if the note was payable generally; but the Courts have, as a rule, a discretion as to costs in general.

§ 86. In presenting a note for payment it should be produced and exhibited; but if it is held at the place of payment on the day it matures, no formal presentment is necessary. See ante, p. 294; also Fullerton v. Bank of U. S., 1 Peters (U. S.) 604 (1828); Bank of U. S. v. Carneal, 2 ibid. 543 (1829); Chicopee Bank v. Philadelphia Bank, 8 Wall. (U. S.) 641 (1869); Woodbridge v. Brigham, 13 Mass. 556 (1816); Bank of Syracuse v. Hollister, 17 N. Y. 46 (1858).

Liability of indorser

2. Presentment for payment is necessary in order to render the indorser of a note liable: Imp. Act, s. 87 (2).

Presentment for payment.

For the rules as to presentment for payment, see section 45, which applies to promissory notes with the modifications specified in section 88. The provisions of section 46, as to excuses for the delay in making presentment, or presentment being dispensed with entirely, as well as those relating to notice of dishonor, also apply to notes with the necessary modifications.

See the notes and illustrations under these sections. Also Siddall v. Gibson, 17 U. C. Q. B. 98 (1858); Saunderson v. Judge, 2 H. Bl. 510 (1795); Roche v. Campbell, 3 Camp. 247 (1812); Britt v. Lawson, 15 Hun (N. Y.) 123 (1878).

Place for presentment.

3. Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice. Imp. Act, s. 87 (3).

Where the place of payment is in the body of the note it is part of the contract: O'Brien v. Stevenson, 15 L. C. R. 265 (1865); Howes v. Bowes, 16 East, 112 (1812). Where it is merely indicated in a foot note or some other part of the note, it has been a disputed point whether it is part of the contract. The affirmative has been held both in England and the United States. See Trecothick v. Edwin, 1 Stark. 468 (1816); Jones v. Fales, 4 Mass. 244 (1808); Platt v. Smith, 14 Johns. (N. Y.) 368 (1817); Woodworth v. Bank of America, 19 Johns. 391 (1822); Dewey v. Reed, 40 Barb. (N. Y.) 17 (1863); Contra, Cunard v. Tozer, 4 N. B. (2 Kerr) 365 (1844); Price v. Mitchell, 4 Camp. 200 (1815); Exon v. Russell, 4 M. & S. 505 (1816); Masters v. Baretto, 8 C. B. 433 (1849); Hill v. Cooley, 46 Penn. St. 259 (1863).

The Act recognizes such a memorandum, but apparently not as part of the contract, as presentment at the place indicated is made optional.

87. The maker of a promissory note, by making it— *Liability of maker.*

(*a*) Engages that he will pay it according to its tenor;

(*b*) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse. Imp. Act, s. 88 (1) (2). *Estoppel of maker.*

The position of the maker of a note is similar in most respects to that of the unconditional acceptor of a bill: section 88, s-s. 2. He is the primary debtor; the indorsers being only secondarily liable, until after dishonor and notice, unless the latter is waived or dispensed with. For the liabilities of an acceptor, see sections 54 and 57.

It is frequently a disputed question whether the maker of a note is personally liable, or whether he is a mere agent

§ 88.

Liability of maker.

or officer, and the note is that of some principal or corporation. It is impossible to reconcile the conflicting decisions on this point, as regards the acceptors of bills and the makers of notes. It may be said generally that the acceptor of a bill has sometimes been liable on an acceptance expressed in words which if in a note would not have bound him personally. See section 17 and the notes and illustrations thereunder. Also Kerr v. Parsons, 11 U. C. C. P. 513 (1861); Corporation of Toronto Township v. McBride, 29 U. C. Q. B. 13 (1869); Archibald v. Brown, 24 L. C. J. 85 (1879).

(*b*) See the similar rule as to the acceptor of a bill: section 54, s-s. 3.

A "holder in due course" has been defined in section 29. The reason for this estoppel is that the maker by issuing a note in this form has in effect made these representations to the person who becomes such a holder, and after it is acted upon cannot be allowed to claim the contrary. See Perkins v. Beckett, 29 U. C. C. P. 395 (1878); Taylor v. Croker, 4 Esp. 187 (1803); Drayton v. Dale, 2 B. & C. 293 (1823); Smith v. Marsack, 6 C. B. 486 (1848); Lane v. Krekle, 23 Iowa. 404 (1867); Wolke v. Kuhne, 109 Ind. 313 (1886).

Application of Part II. to notes.

88. Subject to the provisions in this part, and except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes:

Corresponding terms.

2. In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order:

3. The following provisions as to bills do not apply to notes, namely, provisions relating to— § 88. What provisions do not apply

(*a*) Presentment for acceptance;

(*b*) Acceptance;

(*c*) Acceptance supra protest;

(*d*) Bills in a set: Imp. Act, s. 89 (1) (2) (3).

The following sections in Part II. of the Act do not apply to promissory notes:—3, 4, 5, 6, 15, 17, 18, 19, 36, s-ss. 3, 39, 40, 41, 42, 43, 44, 53, 54, s.-ss. (1), (2), 64, 65, 66, 67 and 70.

4. Where a foreign note is dishonored, protest thereof is unnecessary, except for the preservation of the liabilities of indorsers. Imp. Act, s. 89 (4). As to foreign notes.

The exception in this sub-section is not in the Imperial Act. Its effect is to place foreign notes on the same footing as foreign bills: section 51, s-s. 2.

PART V.

SUPPLEMENTARY.

Good faith.

89. A thing is deemed to be done in good faith within the meaning of this Act, where it is in fact done honestly whether it is done negligently or not. Imp. Act, s. 90.

The expression "in good faith" is used in section 29 with reference to a holder in due course acquiring a bill; in section 59, with reference to payment in due course; and in sections 78 and 81, with reference to the payment of a crossed cheque.

The rule of the civil law is that "good faith is always presumed; he who alleges bad faith must prove it": C. C. Art. 2202. See section 30 as to the shifting of the onus of proof once fraud is proved.

Origin of section.

This section was considered in England recently in the case of Tatam v. Haslar, 23 Q. B. D. 345 (1889). Denman, J., there says that it is obviously founded upon the distinction which is pointed out by Lord Blackburn in Jones v. Gordon, 2 App. Cas. at p. 629 (1877), between honest blundering or carelessness and a dishonest refraining from inquiry. The following is the substance of the remarks referred to:—If value has been given for a bill, it is not enough to show that there was carelessness, negligence or foolishness in not suspecting that the bill was wrong when there were circumstances that might have led a man to suspect that. It is necessary to show that the person who gave value for the bill, whether the value given be great or small, was

affected with the notice that there was something wrong about it when he took it. It is not necessary that he should have notice of what the particular wrong was. Evidence of carelessness or blindness may be good evidence upon the real question, which is, whether he did know that there was something wrong in it. If he was honestly blundering and careless, and so took a bill or note when he ought not to have taken it, still he would be entitled to recover. But if the facts and circumstances are such that the jury, or whoever has to try the question, comes to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained on this account from asking questions or making further inquiry—I think that is dishonesty. 89.

In re Gomersall, 1 Ch. D. at p. 146 (1875), it is said that "negligence or carelessness on the part of the holder of a bill, is not of itself sufficient to deprive him of his remedies for procuring its payment. But negligence or carelessness, when considered in connection with the surrounding circumstances, may be evidence of mala fides." In Swan v. North British Australasian Co., 2 H. & C. 184 (1863), Byles, J., says: "The negligence of the holder makes no difference in his title. However gross the holder's negligence, if it stop short of fraud, he has a title." The same rule was laid down in Goodman v. Harvey, 4 A. & E. at p. 876 (1836), going somewhat farther in this direction than Crook v. Jadis, 5 B. & Ad. 909 (1834), which was a partial departure from the rule laid down in Gill v. Cubitt, 3 B. & C. 466 (1824), when the jury was told that the question was, whether the holder of the bill took it under circumstances that ought to have excited the suspicion of a prudent and careful man. This last case was disapproved of in Bank of Bengal v. McLeod, 5 Moore's Indian Appeals, 1 (1849), and Raphael v. Bank of England, 17 C. B. 161 (1855); and in London and County Bank v. Groome, 8 Q. B. D. 288 (1881), it was held to have been overruled. The old rule in England was similar to that laid down in the recent cases and adopted by the Act.

Bad faith more than negligence.

§ 90.

Some American authorities followed Gill v. Cubitt, but the contrary doctrine has been firmly established there. See Murray v. Lardner, 2 Wall. (U.S.) 110 (1864); Shaw v. Railroad Co., 101 U. S. (11 Otto) 564 (1879); Swift v. Smith, 102 U. S. (12 Otto) 444 (1880); Shreeves v. Allen, 79 Ill. 553 (1875); Johnson v. Way, 27 Ohio St. 374 (1875); Mabie v. Johnson, 6 Hun (N. Y.) 309 (1876); Stimson v. Whitney, 130 Mass. 591 (1881); Daniel, §§ 775, 1503.

This rule has been generally recognized in Canada, although there are expressions in certain cases that are not quite consistent with it.

Signature

90. Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority: Imp. Act, s. 90 (1).

As to what is a writing or signature within the meaning of the Act, see ante, pp. 33 and 36.

As to a signature by procuration, see section 25 and the notes and illustrations thereunder.

The person whose name is signed is sometimes held liable on the ground of having authorized it before it was signed, sometimes on account of having ratified it, and frequently on the ground of estoppel.

ILLUSTRATIONS.

See also illustrations ante pp. 143 and 148.

1. In an action against B. and S., a firm of solicitors, on promissory notes indorsed by B. in the name of the firm, it was proved that on other occasions S. had indorsed in the same manner with B.'s knowledge. Held, sufficient evidence to go to the jury of a mutual authority: Workman v. McKinstry, 21 U. C. Q. B. 623 (1862).

2. Where one executor was authorized by the others to manage the estate, and signed notes in the names of all executors, but was

given no authority to bind them personally, and they were not aware of the giving of the notes. Held, that the others were not liable on the notes: Gore Bank v. Meredith, 26 U. C. Q. B. 237 (1866). § 90.

3. Where a person, whose name had been signed as indorser for notes by a friend, gave a mortgage to secure the indebtedness and renewals "similarly indorsed," and allowed the maker to sign his name to the mortgage so that it would be in the same handwriting, the indorser was held liable for the indorsements although they were for a much larger sum than he was aware of: Merchants' Bank v. Bostwick, 3 Ont. A. R. 24 (1878).

4. The power to draw bills is not of itself sufficient to establish the right to indorse in the name of the principal: Prescott v. Flinn, 9 Bing. at p. 22 (1832).

5. Where a wife had authority to indorse bills for her husband, and the name was written by her daughter in her presence and at her request, held, sufficiently authorized: Lord v. Hall, 8 C. B. 627 (1849).

6. The payee of a note transfers it for value without indorsing it. The transferee is not authorized to indorse it in his name: Harrop v. Fisher, 10 C. B. N. S. 196 (1861).

7. The right of a solicitor to sign his firm's name to a cheque, does not authorize him to issue postdated cheques which are in effect equivalent to bills payable after date: Forster v. Mackreth, L. R. 2 Ex. 163 (1867).

8. If another person sign the name of the party in his presence and at his request, it is the same as if he did it himself: Sager v. Tupper, 42 Mich. 603 (1880).

9. Verbal authority to execute or indorse a bill is sufficient, and it is not essential that the agent add his own name or initials: Merchants' Bank v. Bank of Columbia, 5 Wheat. (U. S.) 326 (1820); First Nat. Bank v. Loyhed, 28 Minn. 398 (1881); Bettis v. Bristol, 56 Iowa, 41 (1881).

2. In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing is duly sealed with the corporate seal; but nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal. Imp. Act, s. 91 (2). As to corporations.

§ 91.

As to the powers of foreign, Dominion and Provincial corporations with regard to bills and notes, see the notes and illustrations ante, pp. 124-9.

Before the Act it was doubtful whether an instrument in the form of a note, but under the seal of a company, was a negotiable note: Merritt v. Maxwell, 14 U. C. Q. B. 50 (1856); Merchants' Bank v. U. E. Club, 44 ibid. 468 (1879); Crouch v. Credit Foncier. L. R. 8 Q. B. at p. 382 (1873); Clark v. Farmers' Mfg. Co., 15 Wend (N.Y.) 256 (1836); Merritt v. Cole, 9 Hun (N. Y.) 98 (1876).

A municipal corporation in Ontario may be liable on a promissory note under seal or without a seal: Armstrong v. Garafraxa, 44 U. C. Q. B. 515 (1879).

An instrument in the form of a note signed and sealed is not a promissory note: Wilson v. Gates, 16 U. C. Q. B. 278 (1858); Warren v. Lynch, 5 Johns. 239 (1810); Rawson v. Davidson, 49 Mich. 607 (1883); Brown v. Jordhal, 32 Minn. 135 (1884).

Computation of time.

91. Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded: "non-business days," for the purposes of this Act, mean the days mentioned in the fourteenth section of this Act; any other day is a business day. Imp. Act, s. 92.

The Imperial Act names the holidays; the list in Canada being so much longer and varying with the provinces, it was more convenient to embody them by reference.

Some of the short delays in the Act are:—The drawer has two days to decide whether he will accept a bill: section 42; notice of dishonor must be given the next following business day: section 49 (*k*), and s-s. 4; and presentment to the acceptor for honor should be on the day following maturity: section 66, s-s. 2.

92. For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill or note has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting. Imp. Act, s. 93. S. 92. When noting is equivalent to protest.

93. Where a dishonored bill is authorized or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonored, any justice of the peace resident in the place may present and protest such bill and give all necessary notices, and shall have all the necessary powers of a notary in respect thereto: Imp. Act, s. 94. Protest when notary is not accessible.

The Imperial Act reads, "when a dishonored bill or note," etc. No reason was given for the omission of "note." Under section 88. and sub-section 5 of this section, this provision would, no doubt, be held to apply to notes. It has been the law in Lower Canada and Quebec since 1849: C. S. L. C. c. 64, s. 24; C. C. Art. 2304. Instead of a justice of the peace, the Imperial Act names as the substitute for a notary "any householder or substantial resident." Justices of the peace are not so common in England as in Canada. The powers of a notary referred to are those relating to presentment, protest, and notice of dishonor in sections 41, 45, 49, 51, 64, 66 and 67. Further changes.

Notaries.—In England, notaries are appointed by the Archbishop of Canterbury, acting as the Court of Faculties. In Canada, they are provincial officers. In most of the provinces there are statutes regulating their appointment, duties and powers. See R. S. O. c. 175; R. S. Q. Arts. 3604-

§ 93. 3957; R. S. N. S. c. 34; C. S. N. B. c. 28; R. S. Man. c. 124; Cons. Ord. N. W. T. c. 25; R. S. B. C. c. 145. In the provinces, other than Quebec, they are usually barristers, solicitors or attorneys.

In Quebec the notarial is a distinct profession, and incompatible with that of advocate or attorney. Notaries are the regular conveyancers, and the more important documents must be executed before them "en minute," the notary keeping the original, and giving out certified copies; his certificate alone making full proof of the execution, in all courts, and for registration, etc. Certain less formal documents may be executed "en brevet," the notary then simply attesting the instrument and handing out the original. Promissory notes are sometimes made before a notary in this form, which is analogous to the protest form under the Act. See form in Appendix.

A notary who is one of the indorsers on a promissory note is not entitled to act as notary to make the protest, even where he substitutes the name of another person for his own and purports to make the protest at the request of the person so substituted: Pelletier v. Brosseau, M. L. R. 6 S. C. 331 (1890).

Expenses. **2. The expense of noting and protesting any bill or note, and the postages thereby incurred, shall be allowed and paid to the holder in addition to any interest thereon :**

This clause is not in the Imperial Act, and had been already provided for by section 57. In some of the provincial tariffs no provision is made for a fee for noting. Under this sub-section probably the same fee would be allowed as for a protest. It would also probably be held that a justice of the peace would be entitled to the same fee as a notary, at least in the Province of Quebec, as the statute in force there since 1849 allowed a justice of the peace the same fees as a notary.

3. Notaries may charge the fees in each Province heretofore allowed them: § 93.

Notarial fees.

In some of the provinces these fees were settled by statute; in others they were regulated by usages which were by no means uniform.

Ontario.—The fees allowed in Ontario before the Act were regulated by R. S. C. c. 123, s. 25, and were as follows:—

For the protest of any bill, draft, note or order..	$0 50
For every notice	0 25
For postage, the amount actually expended.	

Quebec.—The tariff of fees and charges in Quebec is found in Schedule B to R. S. C. c. 123, and is as follows:—

For presenting and noting for non-acceptance any bill of exchange, and keeping the same on record	$1 00
Copy of the same when required by the holder..	0 50
For noting and protesting for non-payment any bill of exchange, or promissory note, draft or order, and putting the same on record......	1 00
For making and furnishing the holder of any bill or note with duplicate copy of any protest for non-acceptance or non-payment, with certificate of service and copy of notice served upon the drawer and indorsers	0 50
For every notice, including the service and recording copy of the same, to an indorser or drawer, in addition to the postage actually paid......	0 50

Nova Scotia.—The following tariff is laid down in R. S. C. c. 123, s. 7, for the protest of bills of exchange and promissory notes of $40 and upwards drawn or made at any place in this province upon or in favor of any person in the province:—

For the protest	$0 50
For each notice	0 25
For other than local bills and notes the former charge of $2.50 for each protest, including notices, is still made.	
Postage being additional in all cases.	

§ 93. **New Brunswick.**—The statute of this province, 16 Vict. c. 11, prescribed the following tariff:—

For the presentment and noting of any bill of exchange or promissory note, for non-acceptance or non-payment	$0 50
Protest of note or bill of exchange, when made, including presentment, noting and notice	1 00

Necessary postage to be allowed.

As the Parliament of Canada has exclusive jurisdiction over Bills of Exchange and Promissory Notes, the constitutionality of this provincial Act is open to question. It is said that the charge still usually made in this province is that in force before the Act in question, viz.:—

For protest and all notices	$3 00

Postage actually paid.

Prince Edward Island.—R. S. C. c. 123, s. 8, lays down for this province a tariff similar to that for Nova Scotia. The old tariff was framed in 1776, and allowed:—

For noting bills for non-acceptance	1s.	0d.	Stg.
For every protest	3	6	"

For other than local bills and notes the usual charge still is

For protest and notices	$2 50

Postage in addition.

Manitoba.—The charges in this province appear to be regulated by usage, and are as follows:—

For protest	$1 00
For each notice	0 50

Postage in addition.

North-West Territories.—The charges here also are governed by usage, and are as follows:—

For protest	$2 00
For each notice	0 50

Postage in addition.

British Columbia.—The charges here also are governed by usage, and are as follows:—

For postages and notices	$2 50

Postage in addition.

4. The forms in the first schedule to this Act may be used in noting or protesting any bill or note and in giving notice thereof. A copy of the bill or note and indorsement may be included in the forms, or the original bill or note may be annexed and the necessary changes in that behalf made in the forms: § 93. Forms.

The second part of this sub-section is substantially a repetition of section 51, s-s. 7.

The forms in the first schedule to this Act are copied without change from Schedule B to R. S. C. c. 123, where they are applicable to the Province of Quebec alone, having been inserted there from the schedules to chapter 64 of the Consolidated Statutes of Lower Canada.

It will be observed that even the words "protested in duplicate" have been retained. In Quebec it was formerly compulsory to make out the protest in duplicate and to copy the bill or note in the protest. Neither of these is required by the present Act, so that these words are now inappropriate.

Form J also provides for an attesting witness and the seal of the justice of the peace, although neither of these is required by the Act. As a matter of prudence it might be well to have a witness sign and to affix the seal in such a case, although the use of the forms is not imperative, and immaterial variations would not vitiate them: R. S. C. c. 1, s. 7 (44).

It is a recognized rule in the construction of statutes that their operation will not be restrained by any reference to the words of a form given for convenience sake in a schedule; and if the enacting part and the schedule do not correspond, the latter must yield to the former: Re Baines, 1 Cr. & P. 31 (1840); Dean v. Green, 8 P. D. at pp. 89, 90 (1882).

5. A protest of any bill or note, and any copy thereof as copied by the notary or justice of the peace, shall, in any action, be prima facie evidence Protest prima facie evidence.

§ 94. of presentation and dishonor, and also of service of notice of such presentation and dishonor as stated in such protest.

This provision is taken in substance from Article 2305 of the Civil Code, which also made the duplicate prima facie evidence. For similar provisions as to protests in Ontario, see C. S. C. c. 57, s. 6, and R. S. O. c. 73, ss. 34 and 35, and for Nova Scotia, Prince Edward Island and New Brunswick, R. S. C. c. 123, ss. 7, 8, 10.

See also Ross v. McKindsay, 1 U. C. Q. B. 507 (1845); Codd v. Lewis, 8 ibid. 242 (1850); Merchants' Bank v. McDougall, 30 U. C. C. P. 236 (1879); Southam v. Ranton, 9 Ont. A. R. 530 (1883).

Section 71 (*f*) makes protests out of Canada also prima facie evidence in all courts.

Crossed dividend warrants.

94. The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend. Imp. Act, s. 95.

These warrants are not defined in the Act, and this section is the only provision in it concerning them. The Imperial Act contains in addition a proviso that nothing in the act or in any repeal effected by it shall affect the validity of any usage relating to dividends warrants, or the indorsement thereof: section 97, 3 (*d*). This was inserted to protect the usage of paying these warrants on the indorsement of one of several payees, instead of having all indorse as required by section 32 (*c*).

In Partridge v. Bank of England, 9 Q. B. 396 (1846), it was held that Bank of England dividend warrants payable to a person by name, and not to his order or bearer, were not negotiable, although it was the practice of bankers to treat them as negotiable. Such bills would now be negotiable under section 8, s-s. 4.

In Canada they are usually called dividend cheques, and made payable to order; so that sections 75 to 81 relating to crossed cheques would have applied to them in this form independently of the present section. When they are issued by a bank and drawn upon itself, drawer and drawee being the same person, the holder might at his option treat them as promissory notes, in which case the crossing would be inappropriate.

It is probable that it would be only those that are drawn upon an incorporated bank, that would be held to be dividend warrants within the meaning of the Act, as the policy of the Act is not to recognize any instrument as a cheque which is not drawn upon one of these banks.

95. The enactments mentioned in the second schedule to this Act are hereby repealed, as from the commencement of this Act, to the extent in that schedule mentioned :— Repeal.

Provided, that such repeal shall not affect anything done or suffered, or any right, title or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title or interest: Imp. Act, s. 96. Proviso.

The Acts named in the second schedule were considered to be the only Dominion or Provincial enactments relating to bills and notes not previously repealed.

The articles of the Civil Code which relate to evidence, and which are saved from repeal by the exception at the foot of the schedule, are 2341 and 2342.

As already pointed out, there are isolated provisions in other Acts, chiefly in those relating to procedure in the Courts. These will still be in force, in so far as they do not conflict with the Act.

§ 95.

The proviso is substantially a repetition of section 7 (52) of the Interpretation Act.

The Bank Act not affected.

2. Nothing in this Act or in any repeal effected thereby shall affect the provisions of "The Bank Act.":

The Bank Act in force when the present Act took effect was R. S. C. c. 120. The new Bank Act, 53 Vict. c. 31, came into force on the 1st of July, 1891. This sub-section would also apply to the latter under sub-section 51 of section 7 of the Interpretation Act.

Imperial Acts named not to apply to Canada

3. The Act of the Parliament of Great Britain passed in the fifteenth year of the reign of His late Majesty George III., intituled "An Act to restrain the negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum within that part of Great Britain called England," and the Act of the said Parliament passed in the seventeenth year of His said Majesty's reign, intituled "An Act for further restraining the negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum within that part of Great Britain called England," shall not extend to or be in force in any Province of Canada, nor shall the said Acts make void any bills, notes, drafts or orders which have been or may be made or uttered therein.

This sub-section formed part of the Con. Stat. U. C. c. 42. It was inserted in R. S. C. c. 123, as section 26, but remained applicable to Ontario alone. These Imperial Acts were introduced into Upper Canada by the first statute of that province, 32 Geo. III. c. 1, ante, p. 10. They would also

be in force in Manitoba, the North-West Territories and British Columbia, ante pp. 13-16. "Province" here includes the Territories: R. S. C. c. 1, s. 7 (13).

The other Imperial Acts relating to bills and notes in force in the various provinces are not formally repealed, except such as were made part of the law of Quebec by Article 2340 of the Civil Code, which is repealed as forming part of the second schedule, except in so far as it relates to evidence. It is doubtful if there are any provisions in them not covered by the Act, in which case they would be practically repealed by the new enactment.

96. Where any Act or document refers to any enactment repealed by this Act, the Act or document shall be construed and shall operate as if it referred to the corresponding provisions of this Act. Imp. Act, s. 98. Construction with other Acts, etc.

97. This Act shall come into force on the first day of September next. Commencement of Act

The Act was assented to on the 16th of May, 1890, but did not come into force until the 1st of September of that year.

The Imperial Act, like the Canadian, is not retrospective, but it has been held to be largely declaratory of the prior law. See ante, p. 19. As may be seen from the foregoing pages, the law has varied considerably in the different provinces, so that the Canadian Act cannot be received as declaratory in Canada to the same extent as in England.

In harmony with this principle, it was held in Fyfe v. Boyce, 21 R. L. 4 (1891), that where a person put his name on the back of a note as an "aval" in August, 1890, he was liable without notice of dishonor, although the note matured after the 1st of September, and that section 56 of the Act did not apply to such a not

§ 97. A distinction is to be observed on this point between matters affecting the rights of parties, and those relating to procedure and analogous subjects. Statutes relating to the latter are always retrospective, unless the contrary is declared. Thus, a bill or note issued before the 1st of September, 1890, falling due after that date and dishonored, would be governed by the present Act as to the form of protest, notice, etc. The new Act should also govern as to the due date, if, for example, such a bill or note should fall due on a day made a holiday by the Act, and not a holiday under the old law. See Wright v. Hall, 6 H. & N. 227 (1860); Kimbray v. Draper, L. R. 3 Q. B. at p. 163 (1868); Re Joseph Suche & Co., 1 Ch. D. at p. 50 (1875); Gardner v. Lucas, 3 App. Cas. at p. 603 (1878); Singer v. Hasson, 50 L. T. N. S. 327 (1884); Atty.-Gen. v. Theobald, 24 Q. B. D. at p. 560 (1890)

54-55 VICT. CAP. 17.

Sections 1 to 7, inclusive, of this Act amend respectively sections 11, s-s 1 (*a*); 12; 18; 24; 40; 41, s-s. 2 (*a*); and 51 of the Bills of Exchange Act, 1900. These several amendments have been embodied in these respective sections in the foregoing pages, except 24, which was repealed in 1897.

Common law of England and law merchant shall apply

8. **The rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of the said Act, as hereby amended, shall apply, and shall be taken and held to have applied from the date on which the said Act came into force, to bills of exchange, promissory notes and cheques. Imp. Act, s. 97 (2).**

This clause was in the bill as it passed the House of Commons in 1890, but was struck out in the Senate. See Senate Debates, 1890, p. 467. As to what would have been the effect of the omission of any uniform rule for cases unprovided for by the Act, see ante, pp. 6-16. It will be observed that the present section is made retrospective.

The expression "common law" is used in different senses.

Common law defined.

In this section it is probably used in the comprehensive sense in which it was spoken of by Baron Parke in the House of Lords in Mirehouse v. Rennell, 8 Bing. 515 (1832), when he said:—"Our common law system consists in applying to new combinations of circumstances those rules of law which

§ 8. we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, when they are not plainly unreasonable or inconvenient, to all cases which arise; and we are not at liberty to reject them, and abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient or reasonable as we ourselves could have devised."

Law merchant defined

The "law merchant" is another expression that may not be capable of an exact definition. It has always, as its name implies, recognized the customs and usages of merchants. Indeed, it has been based upon them. "The law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and, as it were, coeval with it. But as a matter of legal history, this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders, in the different departments of trade, ratified by the decisions of courts of law": per Cockburn, C.J., in Goodwin v. Robarts, L. R. 10 Ex., at p. 346 (1875). "When a general usage has been judicially ascertained and established, it becomes a part of the law merchant, which courts of justice are bound to know and recognize": per Lord Campbell in Brandao v. Barnett, 12 Cl. & F. at p. 805 (1846).

Legal usages.

The existence, nature and scope of a given usage is a question of fact. A particular or local usage must be proved each time, until it becomes so notorious that the courts will not require further proof of it, but will take judicial notice of it: per Brett, M.R., in Ex parte Turquand, 14 Q. B. D. at p. 645 (1885). For examples of the application of that principle in the United States, see Bowen v. Newell, 13 N. Y. 290 (1855), and Champion v. Gordon, 70 Penn. St. 47[illegible] (1872), where proved local usages as to cheques payable at a future day having no days of grace received judicial sanc-

tion. See also the remarks of Davidson, J., in La Banque Nationale v. Merchants' Bank, M. L. R. 7 S. C. 336 (1891), as to proof of the custom of the Montreal clearing house regarding unaccepted cheques. 8.

The corresponding section of the Imperial Act has been considered in the case of Re Gillespie. Ex parte Robarts, 16 Q. B. D. 702 (1885). It was there held that section 57 of the Act was not exhaustive as to the damages the holder of a dishonored bill might recover. After quoting section 97, Cave, J., said, p. 705: "It therefore follows, unless there is something in the Act expressly inconsistent with the ancient law, that the right to prove for damage of the kind which I have spoken of still exists." In the same case, in appeal, 18 Q. B. D. at p. 292, Lindley, L.J., says, "section 97 preserves the former liability of the acceptor to indemnify the drawer against his liability in such a case. Section 97 has been added to meet cases not exhaustively dealt with by other sections of the Act." Imperial Act, s. 97 (2).

It will be observed that the language of the section is much broader than the corresponding article of the Civil Code. That Article, No. 2340, reads as follows: "In all matters relating to bills of exchange not provided for in this Code recourse shall be had to the laws of England in force on the 30th of May, 1849." Not only that part of the Code relating to bills of exchange was to be looked at, but the whole Code, before recourse could be had to the laws of England. Now the common law of England and the law merchant are to apply in Quebec as well as in the other provinces, when they are not inconsistent with the "express provisions of the Act." Comparison with.

It is probable that this section will have an important influence in harmonizing the decisions in the various provinces, when the provincial laws differ on subjects directly or indirectly affecting bills and notes, some of which have been considered in the preceding pages, especially under sections 22, 59 and 84.

§ 8. In Noble v. Forgrave, Q. R. 17 S. C. 234 (1899), it was held that the enactment of this section had modified the former law of Quebec by introducing into that province the law of England respecting the liability of makers of notes being only joint and not joint and several, unless the latter liability was specially declared.

The effect of this section does not appear to have been discussed in the Ontario case of Cook v. Dodds, 6 O. L. R. 613 (1903), where the same question was considered.

AMENDING ACT OF 1893.

56 VICTORIA, CHAPTER 30.

The Annunciation, Corpus Christi and the Festival of St. Peter and St. Paul not henceforth to be holidays for bills and notes. Amendment embodied in section 14, p. 86.

AMENDING ACT OF 1894.

57-58 VICTORIA, CHAPTER 55.

"Labor Day," the first Monday in September, made a holiday for bills and notes, and section 14 amended. See p. 86.

AMENDING ACT OF 1897.

60-61 VICTORIA, CHAPTER 10.

Sub-section 2 of section 24 repealed and two new sub-sections substituted. See pp. 137-9.

AMENDING ACT OF 1901.

1 EDWARD VII, CHAPTER 12.

Victoria Day, May 24th, made a holiday for bill and notes, and section 14, s.s. 2, amended. See p. 85.

AMENDING ACT OF 1902.

2 EDWARD VII, CHAPTER 2.

Section 42 repealed and a new section substituted. See p. 237.

OTHER NEGOTIABLE INSTRUMENTS.

The Bills of Exchange Act treats only of bills, cheques and notes. The single exception to this is section 94, relating to dividend warrants, which are really cheques, as pointed out in the notes to that section. There are certain other instruments which represent money, and which by commercial usage or by legislation are gradually acquiring the full measure of negotiability which belongs to bills and notes. This process is very clearly described in the remarks of Cockburn, C.J., in the case of Goodwin v. Robarts, quoted in the Introduction, to which the reader is referred.

A negotiable instrument, strictly so called, is one representing on its face a certain sum of money, which may be transferred by indorsement and delivery, or by delivery alone, so that the holder for the time being has a right to sue upon it in his own name; and if he is a bona fide holder for value before maturity, he may demand the full amount of the face of the instrument. See Crouch v. Credit Foncier, L. R. 8 Q. B. at p. 381 (1873), and Simmons v. London Joint Stock Bank, [1891] 1 Ch. at p. 294.

Bank Notes and Dominion Notes.—As to these see ante, p. 411. The debentures authorized by chapter 31, R. S. C., are also negotiable in the full sense of the term.

Foreign Government Bonds.—In the English Courts the question of the negotiability of these instruments has often come up. The question to be decided has been held in these cases to be whether they were treated as negotiable in the English money market, if consistent with what appeared on

their face, and not simply whether they were made payable to order or bearer, or whether they were considered to be negotiable in foreign countries. See Glyn v. Baker, 13 East, 509 (1811)—East India Bonds; Gorgier v. Mieville, 3 B. & C. 45 (1824)—Prussian Government Bonds; Lang v. Smyth, 7 Bing. 284 (1831)—Neapolitan Bonds; Atty.-Gen. v. Bouwens, 4 M. & W. at p. 190 (1838)—Russian and Danish Bonds; Heseltine v. Siggers, 1 Ex. 856 (1848)—Spanish Stock; Picker v. London and County Bank, 18 Q. B. D. at p. 518 (1887)—Prussian Government Bonds. The course of the jurisprudence is in the direction of favoring the negotiability of such instruments.

Municipal Debentures.—In 1855, by the Act 18 Vict. c. 80, municipal debentures issued in Upper and Lower Canada, payable to bearer, were declared to be transferable by delivery, and those payable to any person or order, by indorsement, the holder for the time being having the right to sue in his own name, and his title not being liable to be impeached if he was a bona fide holder for value without notice.

Similar provisions are found in the municipal Acts now in force in most of the provinces. See R. S. O. c. 223, ss. 429 to 436, and c. 119, s. 38; the Municipal Code, Quebec, Arts. 981-987; R. S. Q. Arts. 4629, 4630; R. S. Man. c. 40, s. 39 (*j*).

The negotiability of municipal debentures may be restrained by inserting a provision requiring registration in the books of the corporation.

They are usually issued for a term of years, with interest coupons attached. The debentures are under the seal of the corporation. It has been thought that on account of their being under seal they would not be treated as promissory notes, but in view of section 90 of the Act this would no longer be an objection. The coupons are generally in the form of ordinary promissory notes signed by one of the officers who execute the debentures. Debentures may be for $100 each or any larger sum.

In Ontario such debentures have been held to be negotiable, and bona fide holders for value have been protected:

Anglin v. Kingston, 16 U. C. Q. B. 121 (1857); Trust and Loan Co. v. Hamilton, 7 U. C. C. P. 98 (1857); Crawford v. Cobourg, 21 U. C. Q. B. 113 (1861); Sceally v. McCallum. 9 Grant, 434 (1862).

In Quebec they have been held to be negotiable like promissory notes, and in suing might be declared upon as such: Eastern Townships Bank v. Compton, 7 R. L. 446 (1871). See also Corporation of Roxton v. E. T. Bank, Ramsay A. C. 240 (1882); Macfarlane v. St. Cesaire, M. L. R. 2 Q. B. 160 (1886); St. Cesaire v. Macfarlane, 14 S. C. Can. 738 (1887); County of Ottawa v. M. O. & W. Ry. Co., ibid. 193 (1886); Pontiac v. Ross, 17 S. C. Can. 406 (1890).

In the United States, such municipal bonds, negotiable in form, notwithstanding they are under seal, are clothed with all the attributes of commercial paper, pass by delivery or indorsement, and are not subject to equities (where the power to issue them exists) in the hands of holders for value before maturity without notice: 1 Dillon, Municipal Corporations, 4th ed., §§ 486, 513. See Cromwell v. Sac Co., 96 U. S. 51 (1877).

Where the power to issue debentures for a given purpose exists, but there has been some irregularity in connection with the passing of the by-law or non-compliance with certain directions, the corporation is estopped from denying the validity of the debentures in the hands of a bona fide holder: Webb v. Commissioners of Herne Bay, L. R. 5 Q. B. 642 (1870); Confederation Life v. Howard, 25 O. R. 197 (1894); Board of Knox Co. v. Aspinwall, 21 Howard (U.S.) 539 (1858); Supervisors v. Schenck, 5 Wallace (U.S.) 772 (1865); Pendleton County v. Amy, 13 Wallace (U.S.) 297 (1871).

Where, however, the debenture refers to a by-law and the by-law on its face shows that it is for a purpose not authorized by law, the debenture is invalid: Confederation Life v. Howard, 25 O. R. 197 (1894); Wiltshire v. Surrey, 2 B. C. R. 79 (1891); Marsh v. Fulton County, 10 Wallace (U.S.) 676 (1870).

Money paid for worthless debentures can be recovered back, as money paid without consideration, or for a consideration that has failed: Straton v. Rastall, 2 T. R. 366 (1788); Young v. Cole, 3 Bing. N. C. 724 (1837); Confederation Life v. Howard, 25 O. R. 197 (1894).

Decisions conflict as to whether coupons are entitled to grace. The weight of authority is in favor of their being payable on the very day of maturity without grace: 2 Daniel, §§ 1499*a*, 1505.

Coupons dishonored bear interest from their maturity: C. C. 1069, 1077. Coupons, negotiable in form, may be sued upon even when detached from the bonds to which they belong: Connolly v. Montreal P. & I. Ry. Co., Q. R. 20 S. C. 1 (1901).

Debentures of other Corporations.—Most railway and other commercial companies incorporated by special Dominion or Provincial Acts are authorized to issue bonds or debentures to a certain extent, which form a first charge on the undertaking. Companies incorporated by Dominion Letters Patent may also issue bonds or debentures for borrowed money: R. S. C. c. 119, s. 37. It is not as yet well settled whether they are negotiable instruments in the full sense of that term. In Ontario, by R. S. O. c. 119, s. 38, bonds and debentures of corporations if payable to bearer are transferable by delivery, and if to order by indorsement and delivery, and the holder may sue in his own name; but the Act is silent as to whether they are free from the equities attaching to them if transferred before maturity. Other provinces have similar provisions.

See Bank of Toronto v. Cobourg P. & M. Ry. Co., 7 O. R. 1 (1884), where bonds are compared to promissory notes; and Desrosiers v. Montreal P. & B. Ry. Co., 6 L. N. 388 (1883), as to coupons.

In England such bonds and debentures of both home and foreign companies have frequently come before the Courts. Even when they were made payable to order or bearer, the transferee has sometimes been denied the right

to sue in his own name, although as a general rule the company which has issued such securities has been held to be estopped from denying their negotiability. The course of the jurisprudence has been towards placing such instruments more nearly on the same footing as bills and notes. The case of Sheffield v. London Joint Stock Bank, 13 A. C. 333 (1888), in the House of Lords, was understood to have somewhat restricted their negotiability. This interpretation was put upon it in Simmons v. London Joint Stock Bank, [1891] 1 Ch. 270; but the House of Lords, in reversing this latter decision, explained that the Sheffield judgment was based upon the particular facts of that case: [1892] A. C. 201.

In Bechuanaland Trading Co. v. London Trading Bank, [1898] 2 Q. B. 658, the cases were carefully reviewed, and it was held that the negotiability of debentures might be established by evidence of modern commercial usage, and that Crouch v. Credit Foncier, in so far as it held the contrary, must be considered to be overruled by Goodwin v. Roberts, L. R. 10 Ex. 337 (1875), and Rumball v. Metropolitan Bank, 2 Q. B. D. 194 (1877). In Edelstein v. Schouler, [1902] 2 K. B. 144, it was laid down that ordinary bonds payable to bearer were negotiable instruments, and that it is not now necessary to tender evidence to this effect, as the Courts will take judicial notice of that fact.

Where an agent in possession of debentures of a corporation, payable to bearer, which are past due, but on which interest is being paid in accordance with a special statute, pledges them for an advance for himself, the fact that they are past due does not destroy their negotiable character. Neither the fact that the bonds had been marked as exhibits in a certain case in which the owner was a party, nor the pledgee's knowledge of the insolvency of the agent was sufficient notice of defects in the pledgor's title. The owner of the bonds having enabled the agent to transfer them by delivery, was held to be estopped from asserting his title to the detriment of a bona fide holder for value: Young v. Macnider, 25 S. C. Can. 272 (1895).

It will be seen from the reports of these cases that holders have been allowed in certain instances higher rights on account of the companies being insolvent, and in others, parties on account of their own conduct or representations, have been estopped from denying the negotiability of instruments which might not have been held to be negotiable in other circumstances.

In the United States such bonds, as well as those issued by the Federal and State Governments and by municipalities, if made payable to order or bearer, are generally considered to be negotiable in the highest sense of that term, as are also the interest coupons: 2 Daniel, §§ 1486-1517*a*.

Company Shares or Stock.—Where certificates are issued to represent such shares or stock they are not recognized in England as being negotiable. See Swan v. N. B. Australasian Co., 2 H. & C. [illegible]5 (1863); France v. Clark, 26 Ch. D. 257 (1884); London County Bank v. River Plate Bank, 20 Q. B. D. 232 (1887); Sheffield v. London Joint Stock Bank, 13 App. Cas. 333 (1888); Williams v. Cady, 15 App. Cas. 267 (1890).

The same rule obtains in Ontario. Even when a certificate contains the clause "Transferable only on the surrender of this certificate," a transferee of the certificate has no title against a subsequent transferee without surrender of the certificate, who in good faith has his transfer first recorded in the books of the company: Smith v. Walkerville Co., 23 Ont. A. R. 95 (1896).

Where, however, the owner signs a blank assignment on the certificate a bona fide holder for value may be able to acquire rights against such owner: Smith v. Rogers, 30 O. R. 256 (1899).

In the United States they are not considered to be negotiable; but are said to be "quasi-negotiable" or assignable, being generally subject to certain restrictions in the charter or by-laws of the company. See 2 Daniel, §§ 1708, 1709.

Bank Deposit Receipts.—The instruments of this character which were in question in the earlier Canadian cases

had not the words "bearer" or "order." and it was held that the holder could not recover in his own name. See Mander v. Royal Canadian Bank, 20 U. C. C. P. 125 (1869); Bank of Montreal v. Little, 17 Grant, 313 (1870); Lee v. Bank of B. N. A., 30 U. C. C. P. 255 (1879). These cases were followed by Maclennan, J.A., in Armour v. Imperial Bank, 15 C. L. T. (Ont.) 391 (1895). In Voyer v. Richer, 13 L. C. J. 213 (1869), the Quebec Courts held that even where the receipt was payable to order it was not negotiable. In the Privy Council, L. R. 5 P. C. 461 (1874), it was said there was "high authority in favor of considering it to be negotiable," but the case was decided on another ground. In Re Central Bank, 17 O. R. 574 (1889), it was held that the bank which had issued such a receipt payable to order was estopped from denying its negotiable character.

Such instruments are treated as negotiable in the United States, except in Pennsylvania.

Letters of Credit.—These are not negotiable instruments: Orr v. Union Bank, 1 Macq. H. L., at p. 523 (1854); British Linen Co. v. Caledonia Ins. Co., 4 Macq. 107 (1861). The Provincial Secretary of Quebec wrote a letter to a government contractor that money would be voted at the ensuing session on his contract, which would be paid to any person to whom he might indorse the letter. He indorsed the letter to a bank for advances on his contract, and the money was voted by the Legislature. It was held by the Supreme Court of Canada that this "letter of credit" was not a negotiable instrument under the Bills of Exchange Act or the Bank Act, and that the bank could not recover upon it from the Government: Jacques Cartier Bank v. The Queen, 25 S. C. Can. 84 (1895).

Circular Notes are negotiable in England: Conflans Quarry Co. v. P-ker, L. R. 3 C. P., at pp. 10 and 12 (1867).

A Post Office Money Order is not a negotiable instrument: Fine Art Society v. Union Bank, 17 Q. B. D. at p. 713 (1886).

FIRST SCHEDULE. Sec. 93, s-s. 4.

Form A.

NOTING FOR NON-ACCEPTANCE.

(Copy of Bill and Indorsements.)

On the 19 , the above bill was, by me, at the request of , presented for acceptance to E. F., the drawee, personally (*or*, at his residence, office or usual place of business), in the city (town *or* village) of and I received for answer, " ."

The said bill is therefore noted for non-acceptance.

A. B.,
Notary Public.

(Date and place.) 19 .

Due notice of the above was by me served upon { A. B., C. D., } the { drawer, indorser, } personally, on the day of (*or*, at his residence, office or usual place of business) in , on the day of (*or*, by depositing such notice, directed to him, at , in His Majesty's post office in the city [town *or* village], on the day of , and prepaying the postage thereon.)

A. B.,
Notary Public.

(Date and place.) 19

Form B.

PROTEST FOR NON-ACCEPTANCE OR FOR NON-PAYMENT OF A BILL PAYABLE GENERALLY.

(Copy of Bill and Indorsements.)

On this day of , in the year 19 , I, A. B., notary public for the Province of , dwelling at , in the Province of , at the request of , did exhibit the original bill of exchange, whereof a true copy is above written, unto E. F., the $\left\{\begin{matrix}\text{drawee}\\ \text{acceptor}\end{matrix}\right\}$ thereof personally (*or*, at his residence, office *or* usual place of business) in , and, speaking to himself (*or* his wife, his clerk, *or* his servant, etc.), did demand $\left\{\begin{matrix}\text{acceptance}\\ \text{payment}\end{matrix}\right\}$ thereof; unto which demand $\left\{\begin{matrix}\text{he}\\ \text{she}\end{matrix}\right\}$ answered: " ."

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the acceptor, drawer and indorsers (*or* drawer and indorsers) of the said bill, and other parties thereto or therein concerned, for all exchange, re-exchange, and all costs, damages and inte[illegible]esent and to come, for want of $\left\{\begin{matrix}\text{acceptance}\\ \text{payment}\end{matrix}\right\}$ of [illegible]

All of which I attest by my signature.

(Protested in duplicate.)

A. B.,
Notary Public.

Form C.

PROTEST FOR NON-ACCEPTANCE OR FOR NON-PAYMENT OF A BILL PAYABLE AT A STATED PLACE.

(Copy of Bill and Indorsements.)

On this day of , in the year 19 , I, A. B., notary public for the Province of , dwelling

at , in the Province of , at the request of , did exhibit the original bill of exchange, whereof a true copy is above written, unto E. F., the { drawee / acceptor } thereof, at , being the stated place where the said bill is payable, and there, speaking to , did demand { acceptance / payment } of the said bill; unto which demand he answered: " ."

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the acceptor, drawer and indorsers (*or* drawer and indorsers) of the said bill, and all other parties thereto or therein concerned, for all exchange, re-exchange, costs, damages and interest, present and to come, for want of { acceptance / payment } of the said bill.

All of which I attest by my signature.

(Protested in duplicate.)

A. B.,
Notary Public.

Form D.

PROTEST FOR NON-PAYMENT OF A BILL NOTED, BUT NOT PROTESTED, FOR NON-ACCEPTANCE.

If the protest is made by the same notary who noted the bill, it should immediately follow the act of noting and memorandum of service thereof, and begin with the words " and afterwards on," etc., *continuing as in the last preceding form, but introducing between the words* " did " *and* " exhibit " *the word* " again," *and, in a parenthesis, between the words* " written " *and* " unto," *the words:* " and which bill was by me duly noted for non-acceptance on the day of ."

But if the protest is not made by the same notary, then it should follow a copy of the original bill and indorsements and noting marked on the bill—and then in the protest, introduce, in a parenthesis, between the words "written" *and* "unto," *the words:* "and which bill was on the day of , by , notary public for the Province of , noted for non-acceptance, as appears by his note thereof marked on the said bill."

Form E.

PROTEST FOR NON-PAYMENT OF A NOTE PAYABLE GENERALLY.

(*Copy of Note and Indorsements.*)

On this day of , in the year 19 , I A. B., notary public for the Province of , dwelling at , in the Province of , at the request of , did exhibit the original promissory note, whereof a true copy is above written, unto , the promisor, personally (*or*, at his residence, office, *or* usual place of business), in , and speaking to himself (*or* his wife, his clerk *or* his servant, etc.), did demand payment thereof; unto which demand {he / she} answered: " ."

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the promisor and indorsers of the said note, and all other parties thereto or therein concerned, for all costs, damages and interest, present and to come, for want of payment of the said note.

All of which I attest by my signature.

(Protested in duplicate.)

A. B.,
Notary Public.

FORM F.

PROTEST FOR NON-PAYMENT OF A NOTE PAYABLE AT A STATED PLACE.

(Copy of Note and Indorsements.)

On this day , in the year 19 , I, A. B., notary public for the Province of , dwelling at , in the Province of , at the request of , did exhibit the original promissory note, whereof a true copy is above written. unto the promisor, at , being the stated place where the said note is payable, and there, speaking to , did demand payment of the said note, unto which demand he answered: " ."

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the promisor and indorsers of the said note, and all other parties thereto or therein concerned, for all costs. damages and interest, present and to come. for want of payment of the said note.

All which I attest by my signature.

(Protested in duplicate.)

A. B..
Notary Public.

FORM G.

NOTARIAL NOTICE OF A NOTING, OR OF A PROTEST FOR NON-ACCEPTANCE, OR OF A PROTEST FOR NON-PAYMENT OF A BILL.

(Place and Date of Noting or of Protest.)

1st.

To P. Q. *(the drawer.)*

at

Sir,

Your bill of exchange for $, dated at , the , upon E. F., in favor of C. D., payable days

after {sight, / date,} was this day, at the request of duly {noted / protested} by me for {non-acceptance. / non-payment.}

A. B.,
Notary Public.

2nd. (*Place and Date of Noting or of Protest.*)

To C. D. (*indorser*),
(*or* F. G.)
at

Sir,

Mr. P. Q.'s bill of exchange for $, dated at the , upon E. F., in your favor (*or* in favor of C. D.), payable days after {sight, / date,} and by you duly {noted / protested} by me for {non-acceptance. / non-payment.}

A. B.,
Notary Public.

FORM H.

NOTARIAL NOTICE OF PROTEST FOR NON-PAYMENT OF A NOTE.

(*Place and Date of Protest.*)

To
at

Sir,

Mr. P. Q.'s promissory note for $, dated at , the payable {days / months / on——} after date to {you / E. F.} or order, and indorsed by you, was this day, at

the request of , duly protested by me for non-payment.

A. B.,
Notary Public.

FORM I.

NOTARIAL SERVICE OF NOTICE OF A PROTEST FOR NON-ACCEPTANCE OR NON-PAYMENT OF A BILL, OR OF NON-PAYMENT OF A NOTE.

(To be subjoined to the Protest.)

And afterwards, I, the aforesaid protesting notary public, did serve due notice, in the form prescribed by law, of the foregoing protest for $\left\{\begin{matrix}\text{non-acceptance}\\ \text{non-payment}\end{matrix}\right\}$ of the $\left\{\begin{matrix}\text{bill}\\ \text{note}\end{matrix}\right\}$ thereby protested upon $\left\{\begin{matrix}\text{P. Q.,}\\ \text{C. D.,}\end{matrix}\right\}$ the $\left\{\begin{matrix}\text{drawer}\\ \text{indorsers,}\end{matrix}\right\}$ personally, on the day of (*or*, at his residence, office, *or* usual place of business) in , on the day of ; (*or*, by depositing such notice, directed to the said $\left\{\begin{matrix}\text{P. Q.,}\\ \text{C. D.}\end{matrix}\right\}$ at , in His Majesty's post office in , on the day of , and prepaying the postage thereon).

In testimony whereof, I have, on the last mentioned day and year, at aforesaid, signed these presents.

A. B.,
Notary Public.

FORM J.

PROTEST BY A JUSTICE OF THE PEACE (WHERE THERE IS NO NOTARY) FOR NON-ACCEPTANCE OF A BILL, OR NON-PAYMENT OF A BILL OR NOTE.

(Copy of Bill or Note and Indorsements.)

On this day of , in the year 19 . I, N. O., one of Her Majesty's justices of the peace for the district (*or* county, etc.), of , in the Province of ,

dwelling at (*or* near) the village of , in the said district, there being no practising notary public at or near the said village (*or any other legal cause*), did, at the request of , and in the presence of , well known unto me, exhibit the original $\left\{\begin{matrix}\text{bill,}\\ \text{note,}\end{matrix}\right\}$ whereof a true copy is above written, unto P. Q., the $\left\{\begin{matrix}\text{drawer}\\ \text{acceptor}\\ \text{promisor}\end{matrix}\right\}$ thereof, personally (*or* at his residence, office *or* usual place of business) in , and speaking to himself (his wife, his clerk *or* his servant, etc.), did demand $\left\{\begin{matrix}\text{acceptance}\\ \text{payment}\end{matrix}\right\}$ thereof, unto which demand $\left\{\begin{matrix}\text{he}\\ \text{she}\end{matrix}\right\}$ answered: " ".

Wherefore I, the said justice of the peace, at the request aforesaid, have protested, and by these presents do protest against the $\left\{\begin{matrix}\text{drawer and indorsers}\\ \text{promisor and indorsers}\\ \text{acceptor, drawer and indorsers}\end{matrix}\right\}$ of the said $\left\{\begin{matrix}\text{bill,}\\ \text{note,}\end{matrix}\right\}$ and all other parties thereto and therein concerned, for all exchange, re-exchange, and all costs, damages and interest, present and to come, for want of $\left\{\begin{matrix}\text{acceptance}\\ \text{payment}\end{matrix}\right\}$ of the said $\left\{\begin{matrix}\text{bill.}\\ \text{note.}\end{matrix}\right\}$

All which is by these presents attested by the signature of the said (*the witness*) and by my hand and seal.

(Protested in duplicate.)

(*Signature of the witness*).

(*Signature and seal of the J.P.*)

SECOND SCHEDULE.

ENACTMENTS REPEALED.—Sec. 95.

Province and Chapter.	Title and Extent of Repeal.
Dominion of Canada: Chap. 123, Revised Statutes........	An Act respecting Bills of Exchange and Promissory Notes—The whole Act.
Province of Quebec: Civil Code of Lower Canada	Articles 2279 to 2354, inclusive [*].
Nova Scotia: Revised Statutes, third series, chap. 82.	"Of Bills of Exchange and Promissory Notes." Section 2. The other sections of this chapter have been heretofore repealed.
New Brunswick: Revised Statutes, chap. 116	"Of Bills, Notes and Choses in Action." Section 2. The other sections of this chapter have been heretofore repealed.
30 Vict., 1867, chap. 34.. ..	An Act to amend chap. 116 of the Revised Statutes, "Of Bills, Notes and Choses in Action;" also Act 12th Victoria, chapter 39, relating thereto. Section 1.

[*Except in so far as such articles, or any of them, relate to evidence in regard to bills of exchange, cheques and promissory notes.]

NOTE.—The articles of the Civil Code which are not repealed under the above exception are: Art. 2341, which provides that in the investigation of facts, in actions or suits founded on bills of exchange drawn or indorsed either by traders or other persons, recourse must be had to the laws of England in force on the 30th of May, 1849; also Art. 2342, which provides for the decisory oath and the oath put officially in accordance with Arts. 1246 to 1256, inclusive.

APPENDIX I.

FORMS.

No. 1.

INLAND BILL OF EXCHANGE.—SECS. 3, 4.

$475.50.

Toronto, 1st June, 1904.

Three months after date pay to the order of E. F. & Co., four hundred and seventy-five dollars and fifty-cents, value received.

To Messrs. C. D. & Co., Montreal. A. B.

No. 2.

FOREIGN BILL OF EXCHANGE.—SECS. 3, 4.

Exchange for £200 Stg.

Toronto, 10th May, 1904.

At sight of this First of Exchange (Second and Third unpaid) pay to the order of E. F. & Co., two hundred Pounds Sterling, value received.

A. B.

To the Bank of Montreal. London, Eng.

No. 3.

FOREIGN BILL OF EXCHANGE.—SECS. 3, 4, 9.

£100.

Liverpool, 25th May, 1904.

Sixty days after date pay to our order one hundred Pounds, value received, at current rate of exchange for banker's sight draft on London.

C. D. & Co.

To Messrs. A. B. & Son,
Toronto.

No. 4.

FOREIGN BILL OF EXCHANGE.—SECS. 3, 4, 9.

$500.

Chicago, 1st June, 1904.

Thirty days after date pay to the order of the First National Bank, five hundred Dollars, with exchange on New York, value received, and charge to account of

The A. B. Co.
Per C. D., Manager.

To E. F. & Co.,
Toronto.

No. 5.

CHEQUE CROSSED GENERALLY—NEGOTIABLE.—
SECS. 72, 73.

$250.00.

Montreal, 1st June, 1904.

To the Merchants' Bank,

Pay to E. F., or order, two hundred and fifty dollars.

A. B.

No. 6.

CHEQUE CROSSED SPECIALLY.—NOT NEGOTIABLE.—
SECS. 72, 73.

$575.

Toronto, 1st June, 1904.

To the Canadian Bank of Commerce.

Pay to E. F., or order, five hundred and seventy-five Dollars.

Molson's Bank, not Negotiable.

A. B.

No. 7.

INLAND PROMISSORY NOTE.—SECS. 82, 71 (*e*), 14 (2) (*b*).

$250.00.

Toronto, 15th May, 1904.

DUE 19TH SEPTEMBER.

Four months after date I promise to pay to the order of E. F., at the Molsons Bank, Montreal, two hundred and fifty Dollars, value received.

A. B.

No. 8.

Foreign Promissory Note.—Secs. 82, 71 (e).

Montreal, 31st May, 1904.

Due 30th June.

$500.

One month after date I promise to pay to the order of U. S., at the First National Bank, New York, five hundred Dollars, value received.

A. B.

No. 9.

Notarial Note, *en brevet*.—See p. 434.

On the first day of April, one thousand nine hundred and four, before Mtre. Jacques Cartier Leclerc, the undersigned Notary Public for the Province of Quebec, residing in the Parish of Notre Dame, in the district of Montreal, personally appeared Jean Baptiste Deschamps dit Sarrasin, farmer, and Louis Dubois, son of Pierre, lumberman, both of said parish, who acknowledged themselves to be indebted to Napoleon Leriche, of the village of St. Mathieu, in the said district, capitalist, in the sum of one hundred dollars, value received, which sum they promise jointly and severally to pay to said Napoleon Leriche, or order, in one year from the date hereof with interest at the rate of eight per cent., and with interest at the same rate on interest and principal if not paid when due.

Whereof Acte required and granted en brevet.

Thus done and passed in the office of said notary, the day, month and year first above written, and after reading

hereof the said Sarrasin has signed, and the said Dubois has declared he cannot write his name and has made his mark, the whole in the presence of said notary who has signed.

J. C. Leclerc, N. P.

J. B. Sarrasin,
his
Louis X Dubois
mark.

No. 10.

NOTARIAL ACT OF HONOR.—SEC. 67, S-SS. 3, 4.

On the fourth day of May, one thousand nine hundred and four, I, John Smith, Notary Public for the Province of Ontario, dwelling at the City of Toronto, in said Province, do hereby certify that the original bill of exchange for five hundred dollars annexed to the protest thereof on the other side hereof written, was this day exhibited to C. D., of Toronto, agent, who declared before me, that he would pay the amount of the said bill and protest charges for the honor of A. B., the last indorser thereof, holding the drawer and indorsers and all other persons responsible to him, the said C. D., for the said sum and for all interest, damages and expenses. I have therefore granted this notarial act of honor accordingly. Which I attest,

[Seal] John Smith, N.P.

APPENDIX II.

THE NEGOTIABLE INSTRUMENTS LAW.

The following is the text of the Negotiable Instruments Law, enacted by the State of New York in 1897.

It was also adopted by the following States and Territories in the years indicated:—Connecticut (1897), Colorado (1897), Florida (1897), Massachusetts (1898), Maryland (1898), Virginia (1898), Rhode Island (1899), Tennessee (1899), North Carolina (1899), Wisconsin (1899), North Dakota (1899), Utah (1899), Oregon (1899), Washington (1899), District of Columbia (1899), Arizona (1901), Pennsylvania (1901), Ohio (1902), Iowa (1902), New Jersey (1902), Montana (1903), and Idaho (1903). The numbering of the sections varies in different States. The other changes are very slight.

ARTICLE I.—GENERAL PROVISIONS.

1. Short title.—This Act shall be known as The Negotiable Instruments Law.

2. Definitions and meaning of terms.—In this Act unless the context otherwise requires:

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counterclaim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

3. Person primarily liable on instrument.—The person "primarily" liable on an instrument is the person who, by the terms of the instrument, is absolutely required to pay the same. All other parties are "secondarily" liable.

4. Reasonable time, what constitutes. — In determining what is a "reasonable time" or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

5. Time, how computed; when last day falls on holiday.—Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

6. Application of chapter.—The provisions of this Act do not apply to negotiable instruments made and delivered prior to the passage hereof.

7. Law merchant; when governs.—In any case not provided for in this Act the rules of the law merchant shall govern.

ARTICLE II.—FORM AND INTERPRETATION.

20. Form of negotiable instrument.—An instrument to be negotiable must conform to the following requirements.

1. It must be in writing and signed by the maker or drawer.
2. Must contain an unconditional promise or order to pay a sum certain in money.
3. Must be payable on demand or at a fixed or determinable future time.
4. Must be payable to order or bearer; and

5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

21. Certainty as to sum; what constitutes. — The sum payable is a sum certain within the meaning of this Act, although it is to be paid:

1. With interest: or
2. By stated instalments; or
3. By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due; or
4. With exchange, whether at a fixed rate or at a current rate; or
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

22. When promise is unconditional.—An unqualified order or promise to pay is unconditional within the meaning of this Act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount: or
2. A statement of the transaction which gives rise to the instrument.

But an order or promise to pay out of a particular fund is not unconditional.

23. Determinable future time; what constitutes. — An instrument is payable at a determinable future time, within the meaning of this Act, which is expressed to be payable:

1. At a fixed period after date or sight: or
2. On or before a fixed or determinable future time specified therein; or
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

24. Additional provisions not affecting negotiability.— An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

2. Authorizes a confession of judgment if the instrument be not paid at maturity; or
3. Waives the benefit of any law intended for the advantage or protection of the obligor; or
4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

25. Omissions; seal; particular money.—The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or
2. Does not specify the value given, or that any value has been given therefor; or
3. Does not specify the place where it is drawn or the place where it is payable; or
4. Bears a seal; or
5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

26. When payable on demand.—An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or
2. In which no time for payment is expressed.

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.

27. When payable to order.—The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer or drawee; or
2. The drawer or maker; or
3. The drawee; or
4. Two or more payees jointly; or
5. One or some of several payees; or
6. The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.

28. When payable to bearer.—The instrument is payable to bearer:

1. When it is expressed to be so payable; or
2. When it is payable to a person named therein or bearer; or
3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or
4. When the name of the payee does not purport to be the name of any person; or
5. When the only or last indorsement is an indorsement in blank.

29. Terms when sufficient.—The instrument need not follow the language of this Act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

30. Date, presumption as to.—Where the instrument or an acceptance of any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance or indorsement, as the case may be.

31. Ante-dated and post-dated.—The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

32. When date may be inserted.—When an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.

33. Blanks; when may be filled.—Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled

up strictly in accordance with the authority given and within a reasonable time.

34. Incomplete instrument not delivered.—Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

35. Delivery; when effectual; when presumed. — Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

36. Construction where instrument is ambiguous.—Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, references may be had to the figures to fix the amount;
2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;
3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued;
4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;
5. Where the instrument is so ambiguous that there is doubt whether it is a bill or a note, the holder may treat it as either at his election;
6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed jointly and severally liable thereon.

37. Liability of person signing in trade or assumed name.—No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

38. Signature by agent; authority; how shown. — The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

39. Liability of person signing as agent, etc.—Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

40. Signature by procuration; effect of.—A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

41. Effect of indorsement by infant or corporation.—The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

42. Forged signature; effect of. — Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

ARTICLE III.—CONSIDERATION OF NEGOTIABLE INSTRUMENTS.

50. Presumption of consideration. — Every negotiable instrument is deemed prima facie to have been issued for a valuable

consideration; and every person whose signature appears thereon to have become a party thereto for value.

51. Consideration, what constitutes.—Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.

52. What constitutes holder for value.—Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

53. When lien on instrument constitutes holder for value.—Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

54. Effect of want of consideration. — Absence or failure of consideration is matter of defence as against any person not a holder in due course; and partial failure of consideration is a defence pro tanto, whether the failure is an ascertained and liquidated amount or otherwise.

55. Liability of accommodation party.—An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

ARTICLE IV.—NEGOTIATION.

60. What constitutes negotiation.—An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

61. Indorsement; how made. — The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

62. Indorsement must be of entire instrument. — The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a

negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.

63. Kinds of indorsement.—An indorsement may be either special or in blank; and it may also be either restrictive or qualified or conditional.

64. Special indorsement; indorsement in blank. — A special indorsement specifies the person to whom, or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

65. Blank indorsement; how changed to special indorsement.—The holder may convert a blank indorsement into a special indorsement by writing over the signature . the indorser in blank any contract consistent with the character of the indorsement.

66. When indorsement restrictive.—An indorsement is restrictive, which either

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

67. Effect of restrictive indorsement; rights of indorsee.—A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

68. Qualified indorsement.—A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

69. Conditional indorsement. — Where an indorsement is conditional, a party required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same, or

the proceeds thereof, subject to the rights of the person indorsing conditionally.

70. Indorsement of instrument payable to bearer.—Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery: but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

71. Indorsement where payable to two or more persons.—Where an instrument is payable to the order of two or more payees or indorsers who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

72. Effect of instrument drawn or indorsed to a person as cashier.—Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation or the indorsement of the officer.

73. Indorsement where name is misspelled, et cetera.—Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

74. Indorsement in representative capacity.—Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

75. Time of indorsement; presumption.—Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue.

76. Place of indorsement; presumption. — Except where the contrary appears every indorsement is presumed prima facie to have been made at the place where the instrument is dated.

77. Continuation of negotiable character.—An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

78. Striking out indorsement.—The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

79. Transfer without indorsement; effect of.—Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as

the transferrer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferrer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

80. When prior party may negotiate instrument.—Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this Act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

ARTICLE V.—RIGHTS OF HOLDER.

90. Right of holder to sue; payment.—The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.

91. What constitutes a holder in due course.—A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face;
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such were the fact;
3. That he took it in good faith and for value:
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

92. When person not deemed holder in due course.—Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

93. Notice before full amount paid.—Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

94. When title defective.—The title of a person who negotiates an instrument is defective within the meaning of this Act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for any illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

95. What constitutes notice of defect.—To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

96. Rights of holder in due course.—A holder in due course holds the instrument free from any defect of title of prior parties and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

97. When subject to original defenses.—In the hands of any holder other than a holder in due course, negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

98. Who deemed holder in due course.—Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

ARTICLE VI.—LIABILITIES OF PARTIES.

110. Liability of maker.—The maker of a negotiable instrument by making it engages that he will pay it according to its tenor; and admits the existence of the payee and his then capacity to indorse.

111. Liability of drawer.—The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

112. Liability of acceptor.—The acceptor, by accepting the instrument, engages that he will pay it according to the tenor of his acceptance; and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and
2. The existenece of the payee and his then capacity to indorse.

113. When person deemed indorser.—A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

114. Liability of irregular indorser.—Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties;
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer;
3. If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee.

115. Warranty where negotiation by delivery, et cetera.—Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all prior parties had capacity to contract;
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes.

116. Liability of general indorser.—Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

1. The matter and things mentioned in subsections one, two and three of the next preceding section; and
2. That the instrument is at the time of his indorsement valid and subsisting. And in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case

may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

117. Liability of indorser where paper negotiable by delivery.—Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

118. Order in which indorsers are liable.—As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.

119. Liability of agent or broker.—Where a broker or other agent negotiates an instrument, he incurs all the liabilities prescribed by section one hundred and fifteen of this Act, unless he discloses the name of his principal, and the fact that he is acting only as agent.

ARTICLE VII.—PRESENTMENT FOR PAYMENT.

130. Effect of want of demand on principal debtor.—Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity and has funds there available for that purpose, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

131. Presentment where instrument is not payable on demand.—Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand presentment must be made within a reasonable time after its issue, except that in case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

132. What constitutes a sufficient presentment.—Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf;
2. At a reasonable hour on a business day;
3. At a proper place as herein defined;
4. To a person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

133. Place of presentment.—Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented;
2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;
4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

134. Instrument must be exhibited.—The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

135. Presentment where instrument payable at bank.—Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

136. Presentment where principal debtor is dead.—Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if, with the exercise of reasonable diligence, he can be found.

137. Presentment to persons liable as partners.—Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

138. Presentment to joint debtors. — Where there are several persons not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

139. Where presentment not required to charge the drawer.—Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

140. When presentment not required to charge the indorser.—Presentment for payment is not required in order to

charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

141. When delay in making presentment is excused.—Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

142. When presentment may be dispensed with.—Presentment for payment is dispensed with:

1. Where, after the exercise of reasonable diligence, presentment as required by this Act cannot be made;
2. Where the drawee is a fictitious person;
3. By waiver of presentment express or implied.

143. When instrument dishonored by non-payment.—The instrument is dishonored by nonpayment when

1. It is duly presented for payment and payment is refused or cannot be obtained; or
2. Presentment is excused and the instrument is overdue and unpaid.

144. Liability of person secondarily liable, when instrument dishonored.—Subject to the provisions of this Act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder.

145. Time of maturity.—Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due or becoming payable on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

146. Time; how computed.—Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

147. Rule where instrument payable at bank.—Where the instrument is made payable at a bank it is equivalent to an order

to the bank to pay the same for the account of the principal debtor thereon.

148. What constitutes payment in due course.—Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

ARTICLE VIII.—NOTICE OF DISHONOR.

160. To whom notice of dishonor must be given.—Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is given is discharged.

161. By whom given.—The notice may be given by or on behalf of the holder or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.

162. Notice given by agent.—Notice of dishonor may be given by an agent either in his name or in the name of any party, entitled to give notice, whether that party be his principal or not.

163. Effect of notice given on behalf of holder.—Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

164. Effect where notice is given by a party entitled thereto.—Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

165. When agent may give notice.—Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder.

166. When notice sufficient.—A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

167. Form of notice.—The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

168. To whom notice may be given.—Notice of dishonor may be given either to the party himself or to his agent in that behalf.

169. Notice where party is dead.—When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

170. Notice to partners.—Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution.

171. Notice to persons jointly liable.—Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

172. Notice to bankrupt.—Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

173. Time within which notice must be given.—Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this Act.

174. Where parties reside in same place. — Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following;
2. If given at his residence, it must be given before the usual hours of rest on the day following;
3. If sent by mail, it must be deposited in the post office in time to reach him in usual course on the day following.

175. Where parties reside in different places.—Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter;

2. If given otherwise than through the post office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post office within the time specified in the last subdivision.

176. When sender deemed to have given due notice.—Where notice of dishonor is duly addressed and deposited in the post office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

177. Deposit in post office; what constitutes.—Notice is deemed to have been deposited in the post office when deposited in any branch post office or in any letter-box under the control of the Post Office Department.

178. Notice to subsequent party; time of.—Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

179. Where notice must be sent.—Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the post office nearest to his place of residence, or to the post office where he is accustomed to receive his letters; or

2. If he live in one place, and have his place of business in another, notice may be sent to either place; or

3. If he is sojourning in another place, notice may be sent to the place where he is sojourning.

But where the notice is actually received by the party within the time specified in this Act, it will be sufficient, though not sent in accordance with the requirements of this section.

180. Waiver of notice.—Notice of dishonor may be waived, either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied

181. Whom affected by waiver.—Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

182. Waiver of protest.—A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only for a formal protest, but also of presentment and notice of dishonor.

183. When notice is dispensed with.—Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

184. Delay in giving notice; how excused. — Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

185. When notice need not be given to drawer.—Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person;
2. Where the drawee is a fictitious person or a person not having capacity to contract;
3. Where the drawer is the person to whom the instrument is presented for payment;
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;
5. Where the drawer has countermanded payment.

186. When notice need not be given to indorser.—Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;
2. Where the indorser is the person to whom the instrument is presented for payment;
3. Where the instrument was made or accepted for his accommodation.

187. Notice of non-payment where acceptance refused.—Where due notice of dishonor by non-acceptance has been given notice of a subsequent dishonor by non-payment is not necessary unless in the meantime the instrument has been accepted

188. Effect of omission to give notice of non-acceptance.—An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

189. When protest need not be made; when must be made.—Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required, except in the case of foreign bills of exchange.

ARTICLE IX.—DISCHARGE OF NEGOTIABLE INSTRUMENTS.

200. Instrument; how discharged.—A negotiable instrument is discharged;

1. By payment in due course by or on behalf of the principal debtor;
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;
3. By the intentional cancellation thereof by the holder;
4. By any other act which will discharge a simple contract for the payment of money;
5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

201. When persons secondarily liable on, discharged.—A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;
2. By the intentional cancellation of his signature by the holder;
3. By the discharge of a prior party;
4. By a valid tender of payment made by a prior party;
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;
6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.

202. Right of party who discharges instrument.—Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own

and all subsequent indorsements, and again negotiate the instrument except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and
2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

203. Renunciation by holder.—The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute or unconditional renunciation of his rights against the principal debtor made at or before the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

204. Cancellation; unintentional; burden of proof.—A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

205. Alteration of instrument; effect of.—Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

206. What constitutes a material alteration.—Any alteration which changes:

1. The date;
2. The sum payable, either for principal or interest
3. The time or place of payment;
4. The number or the relations of the parties;
5. The medium or currency in which payment is to be made,

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

ARTICLE X.—BILLS OF EXCHANGE: FORM AND INTERPRETATION.

210. Bill of exchange defined.—A bill of exchange is an unconditional order in writing addressed by one person to another,

signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

211. Bill not an assignment of funds in hands of drawee.—A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

212. Bill addressed to more than one drawee.—A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

213. Inland and foreign bills of exchange.—An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within the State. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

214. When bill may be treated as promissory note.—Where in a bill the drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

215. Referee in case of need.—The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit.

ARTICLE XI.—ACCEPTANCE OF BILLS OF EXCHANGE.

220. Acceptance; how made, et cetera.—The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

221. Holder entitled to acceptance on face of bill.—The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored.

222. Acceptance by separate instrument. — Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor, except in favor of a person to whom it was shown and who, on the faith thereof, receives the bill for value.

223. Promise to accept; when equivalent to acceptance.—An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

224. Time allowed drawee to accept. — The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance if given dates as of the day of presentation.

225. Liability of drawee retaining or destroying bill.—Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

226. Acceptance of incomplete bill.—A bill may be accepted before it has been signed by the drawer; or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

227. Kinds of acceptances.—An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

228. What constitutes a general acceptancy.—An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere.

229. Qualified acceptance. — An acceptance is qualified which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated;
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
3. Local, that is to say, an acceptance to pay only at a particular place;
4. Qualified as to time;
5. The acceptance of some one or more of the drawees, but not of all.

230. Rights of parties as to qualified acceptance.—The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or indorser receives notice of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto.

ARTICLE XII.—PRESENTMENT OF BILLS OF EXCHANGE FOR ACCEPTANCE.

240. When presentment for acceptance must be made.—Presentment for acceptance must be made:

1. Where the bill is payable after sight or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or
2. Where the bill expressly stipulates that it shall be presented for acceptance; or
3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

241. When failure to present releases drawer and indorser.—Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and all indorsers are discharged.

242. Presentment; how made.—Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day, and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;
2. Where the drawee is dead, presentment may be made to his personal representative;
3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

243. On what days presentment may be made.—A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections one hundred and thirty-two and one hundred and forty-five of this Act. When Saturday is not otherwise a holiday presentment for acceptance may be made before twelve o'clock noon on that day.

244. Presentment when time is insufficient.—Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

245. Where presentment is excused. — Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases:

1. Where the drawee is dead or has absconded, or is a fictitious person or a person not having capacity to contract by bill;
2. Where after the exercise of reasonable diligence, presentment cannot be made;
3. Where, although presentment has been irregular, acceptance has been refused on some other ground.

246. When discharged by non-acceptance.—A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained; or
2. When presentment for acceptance is excused and the bill is not accepted.

247. Duty of holder where bill not accepted.—Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

248. Rights of holder where bill not accepted.—When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary.

ARTICLE XIII.—PROTEST OF BILLS OF EXCHANGE.

260. In what cases protest necessary.—Where a foreign bill appearing on its face to be such is dishonored by non-acceptance,

it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

261. Protest; how made.—The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;
3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

262. Protest; by whom made.—Protest may be made by:

1. A notary public; or
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more creditable witnesses.

263. Protest; when to be made.—When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

264. Protest; where made.—A bill must be protested at the place where it is dishonored, except that when a bill is drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

265. Protest both for non-acceptance and non-payment.—A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

266. Protest before maturity where acceptor insolvent.—Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

267. When protest dispensed with.—Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay

ceases to operate, the bill must be noted or protested with reasonable diligence.

268. Protest where bill is lost, et cetera.—Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

ARTICLE XIV.—ACCEPTANCE OF BILLS OF EXCHANGE FOR HONOR.

280. When bill may be accepted for honor.—Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

281. Acceptance for honor; how made.—An acceptance for honor supra protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

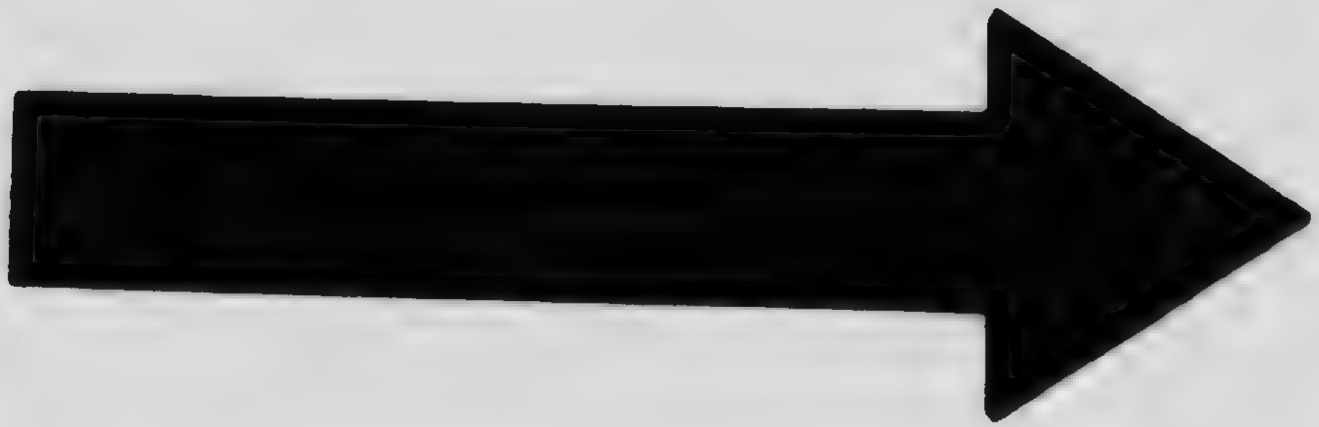
282. When deemed to be an acceptance for honor of the drawer.—Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

283. Liability of acceptor for honor.—The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

284. Agreement of acceptor for honor.—The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

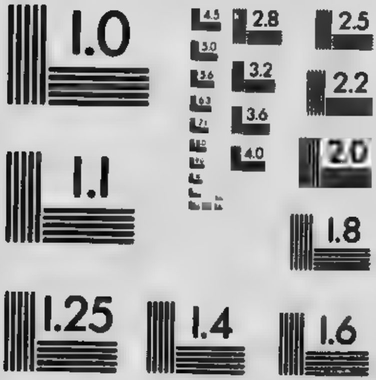
285. Maturity of bill payable after sight; accepted for honor.—Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

286. Protest of bill accepted for honor, et cetera.—Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for non-payment



MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



before it is presented for payment to the acceptor for honor or referee in case of need.

287. Presentment for payment to acceptor for honor; how made.—Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity;
2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and seventy-five.

288. When delay in making presentment is excused.—The provisions of section one hundred and forty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

289. Dishonor of bill by acceptor for honor.—When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

ARTICLE XV.—PAYMENT OF BILLS OF EXCHANGE FOR HONOR.

300. Who may make payment for honor.—Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

301. Payment for honor; how made. — The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it.

302. Declaration before payment for honor.—The notarial act of honor must be founded on a declaration of the payer for honor, or by his agent in that behalf declaring his intention to pay the bill for honor, and for whose honor he pays.

303. Preference of parties offering to pay for honor.—Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

304. Effect on subsequent parties where bill is paid for honor.—Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and

duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

305. Where a holder refuses to receive payment supra protest.—Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

306. Rights of payer for honor.—The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

ARTICLE XVI.—BILLS IN A SET.

310. Bills in sets constitute one bill.—Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill.

311. Rights of holders where different parts are negotiated.—Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

312. Liability of holder who indorses two or more parts of a set to different persons.—Where the holder of a set indorses two or more parts to different persons he is liable on every such part and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

313. Acceptance of bills drawn in sets. — The acceptance may be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

314. Payment by acceptor of bills drawn in sets.—When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

315. Effect of discharging one of a set.—Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

ARTICLE XVII.—PROMISSORY NOTES AND CHECKS.

320. Promissory note defined.—A negotiable promissory note within the meaning of this Act is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

321. Check defined.—A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this Act applicable to a bill of exchange payable on demand apply to a check.

322. Within what time a check must be presented.—A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

323. Certification of check; effect of. — Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance.

324. Effect where the holder of check procures it to be certified.—Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon.

325. When check operates as an assignment.—A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check.

ARTICLE XVIII.—NOTES GIVEN FOR A PATENT RIGHT AND FOR A SPECULATIVE CONSIDERATION.

330. Negotiable instruments given for patent rights.—A promissory note or other negotiable instrument, the consideration of which consists wholly or partly of the right to make, use or sell any invention claimed or represented by the vendor at the time of sale to be patented, must contain the words "given for a patent right" prominently and legibly written or printed on the face of such note or instrument above the signature thereto; and such note or instrument in the hands of any purchaser or holder is subject to the same defenses as in the hands of the original holder; but this section does not apply to a negotiable instrument given solely for the purchase price or the use of a patented article.

331. Negotiable instruments for a speculative consideration.—If the consideration of a promissory note or other negotiable instrument consists in whole or in part of the purchase price of any farm product, at a price greater by at least four times than the fair market value of the same product at the time, in the locality, or of the membership and rights in an association, company or combination to produce or sell any farm product at a fictitious rate, or of a contract or bond to purchase or sell any farm product at a price greater by four times than the market value of the same product at the time in the locality, the words, "given for a speculative consideration," or other words clearly showing the nature of the consideration, must be prominently and legibly written or printed on the face of such note or instrument above the signature thereof; and such note or instrument, in the hands of any purchaser or holder, is subject to the same defenses as in the hands of the original owner or holder.

332. How negotiable bonds are made non-negotiable.—The owner or holder of any corporate or municipal bond or obligation (except such as are designated to circulate as money, payable to bearer), heretofore or hereafter issued in and payable in this State, but not registered in pursuance of any State law, may make such bond or obligation, or the interest coupon accompanying the same, non-negotiable, by subscribing his name to a statement indorsed thereon that such bond, obligation or coupon is his property; and thereon the principal sum therein mentioned is payable only to such owner or holder, or his legal representatives or assigns, unless such bond, obligation or coupon be transferred by indorsement in blank, or payable to bearer, or to order, with the addition of the assignor's place of residence.

ARTICLE XIX.—LAWS REPEALED; WHEN TO TAKE EFFECT.

340. Laws repealed.—The laws or parts thereof specified in the schedule hereto annexed are hereby repealed.

341. When to take effect.—This chapter shall take effect on the first day of October, eighteen hundred and ninety-seven.

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debentures payable to, 450, 452.

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